

## 2009 Annual Survey: Recent Developments in Sports Law

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## **SURVEY**

# **2009 ANNUAL SURVEY: RECENT DEVELOPMENTS IN SPORTS LAW\***

### **INTRODUCTION**

This survey encapsulates sports-related cases adjudicated between January 1 and December 31, 2009. It does not include every decision associated with sports; rather, it is intended to summarize only those cases involving compelling issues that could have an impact on the development of sports law in the coming years. The survey is designed to give the reader brief insight into how much the field has grown and highlight buzzworthy topics. For easy browsing, the survey is divided into sections based on the specific area of the law that applies to the primary issue in each case.

### **ADMINISTRATIVE LAW**

Administrative law governs the actions of government agencies on local, state, and federal levels. These actions can vary from rule-making to engaging in contractual negotiations to enforcing a regulatory system. Very few major sports law cases involve this body of the law, but, as shown in the following case, the consequences of an agency's decision can have a powerful impact on the future of a community.

#### *Lynwood Redevelopment Agency v. Angeles Field Partners, LLC<sup>1</sup>*

Angeles Field Partners, LLC (AFP) appealed a trial court's decision to invalidate the Lynwood (California) Redevelopment Agency's (LRA) approval of two agreements related to a redevelopment project proposed by AFP that included a new football stadium that could be used to lure a National Football League (NFL) team back to Los Angeles. During the contract

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\* This survey was developed and drafted under the supervision of Professor Paul Anderson, Associate Director of the National Sports Law Institute and faculty advisor of the *Marquette Sports Law Review*. Both Ethan Rector (L'10) and Peter Baran (L'11) were responsible for initially compiling the survey, and various members of the *Marquette Sports Law Review* editorial staff assisted in editing the survey.

1. No. B210165, 2009 Cal. App. App. Unpub. LEXIS 9770 (Cal. Ct. App. Dec. 10, 2009).

negotiations, four members of the LRA were also sitting on the Lynwood City Council. Subsequently, the city's electorate voted to recall those individuals. But before new council members could be sworn in, the outgoing members voted to approve the agreements with AFP. Once they were gone, the newly-constituted LRA sought to invalidate its prior approval of the project.

The appellate court reversed, holding that the agreements were valid under state law. It emphasized that (1) the four outgoing members of the city council were still active when the agreements were approved; (2) the LRA did not have standing to sue itself for violating California's open meetings law, even if it did not give properly notify the public that it would be voting on issues related to the redevelopment project; and (3) the agreements were not unconscionable. In making its third conclusion, the court noted that the LRA was attempting to use a contract theory to try to vindicate social policy, which was impermissible under contract law.

#### ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution is an extrajudicial method of settling potentially litigious issues between parties. It usually involves the use of mediation and arbitration, the latter of which is often relied upon to resolve disagreements between employers and employees. Almost every collective bargaining agreement between a professional sports league and a players' union includes a provision requiring the arbitration of certain types of disputes. The following materials demonstrate some of the issues that courts have faced when assessing settlements between parties or the legal effect of a contractual arbitration provision. This section also includes the cases tackled by the American Arbitration Association in its designated role as the exclusive body to resolve disputes related to athlete-eligibility under the Ted Stevens Amateur Sports Act. (Stevens Act).

#### *Bennett v. U.S.A Water Polo, Inc.*<sup>2</sup>

Former Team USA water polo coach Alex Bennett moved to remand his lawsuit against USA Water Polo to state court after it was removed when the national governing body claimed there was a federal question as to whether Bennett's tort claims were pre-empted by the Stevens Act. The court held it did not have federal question jurisdiction, but granted leave to USA Water Polo to conduct discovery as to whether the amount-in-controversy requirement was satisfied in order to establish diversity jurisdiction. The court emphasized that federal question jurisdiction does not exist if removal is based

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2. No. 08-23533-CIV-KING, 2009 U.S. Dist. LEXIS 37753 (S.D. Fla. Apr. 21, 2009).

on a law that creates an internal mechanism to resolve disputes arising under it. The court noted that the Stevens Act provided that type of mechanism to USA Water Polo, and even allowed for possible appeals through arbitration.

*Cayo v. Valor Fighting & Mgmt. LLC*<sup>3</sup>

After the court denied an insurance broker and insurance company's motion to dismiss claims brought against them by mixed martial arts (MMA) fighter Richard Cayo, the broker moved for a determination that its subsequent settlement agreements with Cayo and MMA event organizer Valor Fighting & Management (VFM) were made in good faith, thereby satisfying claims that had been or could be brought against it due to its alleged failure to procure a policy that would cover any liabilities associated with a VFM-sponsored event. Cayo brought claims against VFM, the broker, and two insurance companies after he suffered injuries in a match at the event and VFM failed to assume liability for them, which was required under their contractual agreement. His claims against the broker arose out of a separate contract between VFM and the host facility, under which VFM was obligated to obtain insurance coverage for any liabilities associated with the event. Cayo alleged he was the intended beneficiary of their agreement, and that he could recover against the broker in tort if it had, in fact, failed to procure a policy for the promoter. However, due to uncertainty about whether a policy had been secured, Cayo also brought breach of contract claims against the insurance companies, who opposed the broker's motion.

The court granted the motion. In approving the settlement with Cayo, the court emphasized that the insurance companies were not challenging the good faith of the agreement, only the broker's proposed order to bar any future claims against it. The court noted that state law already protected the insurance companies' interests by continuing to allow claims based on express indemnity agreements. In approving the settlement with VFM, the court concluded that state law did not require the promoter to file a cross-claim before settling with a co-defendant, and that the insurance companies failed to show the combined amount of the settlements was not rationally related to the broker's share of Cayo's injuries.

*Crowell v. U.S. Equestrian Fed'n*<sup>4</sup>

Former Olympian Dorothy Crowell appealed a U.S. Equestrian Federation

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3. No. C 08-4763 CW, 2009 U.S. Dist. LEXIS 48201 (N.D. Cal. June 8, 2009), *settlement approved*, No. C 08-4763 CW, 2009 U.S. Dist. LEXIS 103067 (N.D. Cal. Oct. 20, 2009).

4. AAA 77 190 E 00193 09 (May 3, 2009).



hearing panel's decision to disqualify her from being able to participate in an upcoming event. The national governing body's rules provide that riders and horses must meet qualifying requirements in order to participate at certain levels of competition. One of those rules stipulates that any rider who falls from the same horse twice in a twelve-month period will cause the horse to lose its qualification to compete at the level of the event in which the second fall occurred. In September 2008, Crowell's horse, Radio Flyer, became entangled in a fence at an event, forcing her to dismount. The governing body labeled the incident a fall. Eight months later, Crowell fell from Radio Flyer in another event, causing the horse to lose its qualification. Crowell argued the rule was being applied retroactively because it did not become effective until December 2008. An American Arbitration Association panel upheld the decision, determining that the rule was not applied retroactively to her September 2008 fall, but following her second fall, which occurred after the rule was enacted. Examining relevant cases under New York law, which was used to interpret the rules, the panel noted that courts have consistently held that a rule is not retroactive simply because its application is based in part on events that occurred prior to its effective date.

*Grillier v. CSMG Sports, Ltd.*<sup>5</sup>

After losing its motion for a separate trial on the issue of arbitrability, an athlete representation agency moved to compel arbitration of breach of contract claims brought against it by athlete-agent Kim Grillier after he failed to receive a percentage of the fees generated by National Basketball Association (NBA) clients that he recruited to the agency. The parties executed a written consulting agreement when Grillier originally joined the agency as an independent contractor. The agreement stated that any dispute over its provisions had to be settled in arbitration. But three years later, Grillier allegedly became an official employee under an oral contract. He claimed the contract was consistent with the agency's prior promise to pay him a percentage of the fees generated by the clients that he recruited, but that it did not provide for arbitration of disputes arising under it. Fees were allegedly generated from ten different players, five of whom signed after Grillier became an employee.

The court granted the motion on the claims for compensation for players that Grillier recruited as an independent contractor, but denied it on the claims premised on the alleged oral contract. The court found the arbitration clause in

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5. No. 08-CV-12449, 2009 U.S. Dist. LEXIS 2168 (E.D. Mich. Jan. 12, 2009), *motion to compel arbitration granted in part*, No. 08-CV-12449, 2009 U.S. Dist. LEXIS 50476 (E.D. Mich. June 16, 2009).

the consulting agreement contemplated any dispute related to compensation, so it was broad enough to encompass claims related to the agency's alleged promise. The court also noted that any doubt over whether the arbitration clause continued to apply once Grillier became an employee had to be resolved in favor of arbitration under the Federal Arbitration Act; however, it concluded that the language of the written agreement did not contemplate any dispute related to compensation earned by Grillier if he became an employee.

*Hennefer v. U.S. Sailing*<sup>6</sup>

Sailboat captain James Hennefer appealed a U.S. Sailing protest committee's decision not to modify the results of a race in the 2009 World Championship Qualifying Series for the International One Design after three other boats sailed the wrong course on San Francisco Bay. In addition to a change in the scores, Hennefer sought a Racing Rules of Sailing (RRS) report of bad sportsmanship because the other boats failed to withdraw after learning of their mistake. After conducting a hearing, the protest committee upheld the decision of the race officer not to change the results because all but one boat had sailed off-course and their errors were not prejudicial. In that situation, race officials are taught to let the results stand.

An American Arbitration Association panel determined that it could not modify the results because the United States Olympic Committee (USOC) Bylaws prevent overturning field of play decisions. It emphasized that the race officer's ruling on whether to disqualify the three boats was a judgment call based on his subjective assessment of the conditions, and that there was no evidence that he acted inappropriately in making his decision. The panel also found that the requested change in scores would not be sufficient to remedy the error committed. It noted that the confusion caused by the race committee's instructions had caused all but one boat to sail the wrong course, and that the RRS require any protest committee changes to be as fair as possible to all boats effected. The panel also concluded that no boat could be found guilty of violating the sportsmanship rule because none of them believed they had committed a mistake.

*Hicks v. HSInternational Sports Mgmt., Inc.*<sup>7</sup>

A California-based sports management company and one of its agents moved to compel arbitration of claims brought against them by a client, professional track and field athlete Kevin Hicks, when they failed to enter him

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6. AAA 77 190 00252 09 (June 25, 2009).

7. No. 09-6185-HO, 2009 U.S. Dist. LEXIS 103138 (D. Or. Oct. 27, 2009).

in enough events to satisfy his endorsement contract with Nike, and retained and cashed a \$12,000 payment that he had received after he had unilaterally terminated their representation agreement. The agent first approached Hicks following a collegiate track race in Florida, and later induced him to give up his remaining amateur eligibility and turn pro. Hicks signed a representation agreement with the management company that entitled it to keep fifteen percent of his earnings from competitions, appearance fees, bonuses, and endorsement deals. However, the agreement also allowed Hicks to terminate the arrangement at any time. Subsequently, the management company negotiated a long-term endorsement contract with Nike, under which Hicks would earn at least \$450,000 if he competed in a designated number of sanctioned events. After they failed to enter him in enough events to satisfy the Nike agreement, Hicks informed them that they could no longer endorse checks on his behalf. One month later, he terminated the representation agreement. The court granted the motion, holding the arbitration clause in the representation agreement was sufficiently broad to encompass Hicks's claims regarding its enforceability, not just his claims arising out of it. The court emphasized that Hicks failed to argue that the arbitration clause was void; rather, he claimed the entire agreement was void, and the clause's language covered that type of dispute.

*Hunter v. U.S. Amateur Boxing, Inc.*<sup>8</sup>

Michael Hunter appealed a U.S. Amateur Boxing committee's decision to disqualify him for using an illegal hand wrap during his victory over Lenroy Thompson in one of the national governing body's sanctioned tournaments. A U.S. Amateur Boxing technical rule dictates that hand wraps can be no longer than fifteen yards in length, and one of Hunter's wraps admittedly exceeded that standard. However, the rule does not prescribe any consequences for its violation. An American Arbitration Association (AAA) panel reinstated the decision of the match's referee because the governing body did not have the authority to disqualify Hunter. The panel emphasized that Hunter was entitled to know the consequences for violating a rule before sanctions could be imposed. It also found that U.S. Amateur Boxing violated its own rules by (1) failing to supervise the wrapping, (2) failing to provide a mechanism to appeal the committee's decision, and (3) failing to provide due process to either of the affected athletes. The panel noted that the violation would not have occurred if the first rule had been followed, and the referee's decision would not have been overturned if the other rules had been followed.

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8. AAA No. 77 190 E 00279 09 (June 16, 2009).

*Jeffers v. D'Alessandro*<sup>9</sup>

Former professional football player Patrick Jeffers appealed a trial court's decision that compelled arbitration of his claims against the Carolina Panthers and the court's subsequent judgment that affirmed an arbitrator's award dismissing those claims, which arose out of the surgery performed on his knees by the team's physicians. Jeffers tore the ACL in his right knee during a preseason game before the 2000 season, and agreed to allow one of the team's physicians to repair the tear and a second team physician to perform minor arthroscopic procedures on his other knee. Following the procedure, Jeffers was able to rehabilitate his right knee, but suffered weakness in his other knee, and pain and swelling in both knees. After playing in a few games the following season, he was released by the Panthers in August 2002. Jeffers brought tort claims against the team for its decision to retain the second team physician, who allegedly performed additional, unauthorized procedures during the surgery that resulted in the deterioration of his knees and prematurely ended his career. After the trial court granted the team's motion to compel arbitration, an arbitrator dismissed Jeffers's grievance because it was not filed within the time limit set forth in the National Football League (NFL) Collective Bargaining Agreement (CBA).

The appellate court affirmed, holding that Jeffers's claims were pre-empted by the Labor Management Relations Act (LMRA) and subject to arbitration under the terms of the CBA. The court emphasized that any state law claim that was substantially dependent upon the application of the provisions of the CBA was pre-empted by the LMRA, and determined that Jeffers's claims were entirely dependent upon a duty allegedly violated by the team's physician that did not exist independent of that agreement. It reasoned that any duty the Panthers had to use reasonable care in retaining the physician arose only because the team hired him, and that the duty to hire him arose solely from the CBA. The court also noted that Jeffers did not have to contend that the team failed to comply with the specific provisions of the CBA in order to find his claims were pre-empted, emphasizing that most labor contracts include implied rights and that an arbitrator would likely conclude that the agreement at issue required teams to not only retain physicians, but competent physicians. Finally, the court found there was no reason why the arbitration award should not be confirmed, noting Jeffers's claims were subject to arbitration because they involved the application of the CBA's medical rights provision.

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9. 681 S.E.2d 405 (N.C. Ct. App. 2009).

*Pressler v. Duke Univ.*<sup>10</sup>

Duke University and one of its employees appealed a trial court's order that denied their motion to stay proceedings pending the arbitration of defamation claims brought against them by former Duke lacrosse coach Mike Pressler. The university and Pressler entered into a three-year contract in June 2005 that incorporated by reference the school's dispute resolution policy. Under the policy, all disputes arising out of Pressler's employment were subject to arbitration. However, in 2006, Pressler resigned in the midst of allegations that members of the lacrosse program had raped a stripper at a team party. As part of Pressler's settlement package, all obligations arising from earlier agreements between the parties were cancelled, and both parties agreed not to make disparaging comments about one another. None of the terms in the package mentioned the arbitration of any claims arising in the future or the school's dispute resolution policy. Subsequently, a University employee made allegedly slanderous remarks about Pressler to a reporter, and another unnamed school official made allegedly false statements about his employment to the Associated Press. The appellate court affirmed, holding there was competent evidence to support the conclusion that there was no longer a valid arbitration agreement between the parties when the alleged defamation took place. It emphasized that Pressler's settlement package included a mutual release cancelling all obligations arising out of his 2005 employment contract, and that the coach could only be subject to the University's dispute resolution policy through the now-cancelled agreement.

*Streeter v. Oakland Raiders*<sup>11</sup>

The Oakland Raiders and franchise owner Al Davis appealed a trial court's decision to deny their motion to compel arbitration of claims brought against them by former Raiders employee George Streeter after the team fired him just eight months after it had allegedly offered him the position for a term of one year. After he was fired, Streeter sought to find out if he had any legal recourse against the team. A friend within the NFL put him in contact with the league's counsel on litigation matters. There was a factual dispute over how much Streeter was informed about the league's dispute resolution process during their conversation, but he was advised to write a letter to NFL Commissioner Roger Goodell. Streeter complied with that request, informing the commissioner that he was seeking relief under guidelines established by the league to protect employees. Shortly afterwards, the league's counsel

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10. 685 S.E.2d 6 (N.C. Ct. App. 2009).

11. No. A122994, 2009 Cal. App. Unpub. LEXIS 8260 (Oct. 16, 2009).

wrote to Streeter and the Raiders, with the subject line of the letter entitled "Dispute Certified for Arbitration." The letter claimed that Streeter's correspondence to the commissioner had requested arbitration of their employment dispute. Just over a month later, the league's counsel emailed Streeter to inform him that an arbitrator wanted to schedule a conference call. Streeter claimed this email made him realize that his dispute would be resolved through a procedure that he did not want to use. He hired an attorney, who informed the arbitrator that the NFL did not have jurisdiction over Streeter's dispute with the Raiders. Less than three weeks later, Streeter filed the instant suit.

The appellate court affirmed, holding there was no error in finding that Streeter had not agreed to submit his dispute to the league's dispute resolution process or waived his right to object to it. The court found that Streeter did not have a pre-dispute understanding that his grievances would be submitted to arbitration, noting that there was no written agreement governing the terms of his employment. It also determined that his communications with the NFL did not show an intent to initiate the dispute resolution process. Even though he had referred to the league's "guidelines" in his letter to the commissioner, he did not refer to the league's policy, let alone indicate that he agreed to it. Finally, the court concluded that Streeter's delay in objecting to the process was justified, emphasizing that his early communications with the league's counsel had convinced him that the league's dispute resolution guidelines were not binding.

*U.S. Anti-Doping Agency v. Brunemann*<sup>12</sup>

Former National Collegiate Athletic Association (NCAA) swimming champion Emily Brunemann tested positive for a substance banned under the International Swimming Federation (FINA) rules in August 2008. It was her first anti-doping violation. After returning from a trip to Mexico, the soon-to-be University of Michigan senior ingested a pill from a bottle containing her mother's prescription medication. She thought the pill was a laxative, but it was actually medication prescribed to treat a condition of which Brunemann was unaware. The label on the bottle clearly stated that the pills contained the banned substance and Brunemann did not consult any USADA materials, check the USADA website, or call the USADA drug hotline before taking one. The USADA argued for a two-year ban under the 2009 World Anti-Doping Code. Brunemann argued the 2003 version of the code should apply based on when the violation occurred. Under the older version, an athlete that tested

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12. AAA No. 77 190 E 00447 08 (Jan. 26, 2009).

positive for a substance that was particularly susceptible to anti-doping violations could receive no more than a one-year ban for her first violation if the use of the substance was not intended to enhance performance.

The North American Court of Arbitration for Sport (CAS) panel determined that Brunemann should receive a six-month ban under the provisions of the 2003 WADA Code. It emphasized that the doctrine of *lex mitior* required it to use the version with the less severe sanction. In determining the period of ineligibility, the panel noted that other athletes had received sanctions of less than six months for accidentally ingesting banned substances, including the diuretic at issue. However, the panel also found that Brunemann had failed to take basic steps to avoid ingesting it. After comparing her degree of fault to the degree of fault of the other athletes, the panel determined that she should be punished more harshly, but that her inexperience with the USADA testing procedures, her lack of individualized training in anti-doping matters, and her lack of intent to cheat made the maximum ban too severe to impose.

*U.S. Anti-Doping Agency v. O'Neil*<sup>13</sup>

Judo star Joshua O'Neil tested positive for a ritalinic acid, a substance contained in the prescription drug Ritalin and banned under 2009 WADA Code. It was his first anti-doping violation. O'Neil took a Ritalin tablet two days prior to the competition in which he tested positive. He claimed that he took the drug to prepare for an upcoming firefighter examination. He sought a reduction of the standard two-year suspension handed out for first offenses, arguing that (1) he did not take the drug with the intent to gain a competitive advantage and (2) the proposed sanction disproportionately affected his chance to qualify for the 2012 Olympics. The North American CAS panel upheld the USADA's imposition of a two-year suspension, but applied it retroactively to the date when the violation occurred. The panel was not convinced that O'Neil did not know that Ritalin was banned, emphasizing that he could have logged onto the USADA's website and discovered that the agency had clearly established that the drug was prohibited. The court also found that the sanction was proportionate to his violation, noting that the WADA Code prohibited it from considering the schedule of sporting events in determining the length of a suspension. The ban was applied retroactively because O'Neil admitted his mistake and was forthright with the panel in his testimony.

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13. AAA No. 77 190 00384 09 (Dec. 9, 2009).

*U.S. Anti-Doping Agency v. Page*<sup>14</sup>

Cyclo-cross athlete Jonathan Page failed to report for a drug test following a World Cup event, which constituted an anti-doping violation in the absence of a compelling justification under the International Cycling Union's (UCI) rules. Prior to the event, Page was chosen as a reserve rider that might have to provide a drug sample. That selection required him to report to the anti-doping control station within thirty minutes of the end of the race. His rider number was posted to indicate his selection in accordance with the UCI rules. The USADA argued for a two-year ban, even though Page would not have been tested. Page argued that exceptional circumstances should excuse his absence. He also claimed that the USADA notified the UCI as early as 2007 that it would only pursue charges against reserve riders who would have actually been tested.

The North American CAS panel determined that Page did not commit a doping violation. It noted that Page was obligated to report regardless of whether he would be tested, but held he had demonstrated compelling justifications for his absence. During the race, Page had suffered a concussion and other injuries in a crash, which forced him to pull out before finishing. In addition, the two backup individuals that he normally designated to look at the numbers posted at the anti-doping control station had failed to check on his status. Finally, a number of other personal circumstances leading up to the race also prevented him from being as attentive to the anti-doping requirements. The panel emphasized that there was no evidence that Page was aware of his selection or had deliberately avoided a potential test.

*U.S. Anti-Doping Agency v. Hardy*<sup>15</sup>

World record-holding swimmer Jessica Hardy tested positive for a banned substance under FINA rules during the U.S. Olympic Trials in July 2008. It was her first anti-doping violation. During the trials, the 21-year-old was tested on three separate occasions. The results from the first test and third test came back negative, but the second test came back positive. After being notified of the result, Hardy decided to withdraw from the U.S. Olympic team. Subsequently, the USADA was informed that the samples in her other two tests revealed the presence of suspect transitions of the banned substance. Hardy had been taking supplements manufactured by AdvoCare in 2007. The USADA literature warns against taking supplements, and Hardy was aware of the danger that they could be contaminated. However, she diligently

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14. AAA No. 77 190 16 09 (Feb. 4, 2009).

15. AAA No. 77 190 00288 08 (May 2, 2009).



researched AdvoCare's products and received assurances from the company that they were safe. Following the positive test, Hardy sent supplements from the same batch that she was taking to two different drug-testing laboratories. Both labs determined that one of the products was contaminated with the banned substance. The USADA argued for a two-year ban. Hardy argued that her sanction should be reduced, and that the International Olympic Committee's (IOC) recent amendment to Rule 45 of the Olympic Charter should not be applied to her case. The amendment provided that any athlete who received a ban of more than six months for a doping violation could not participate in the Olympic Games that followed the expiration of that sanction. If applied, it would have also made Hardy ineligible to compete in the 2012 Olympics.

The North American CAS panel determined that Hardy's ban should be reduced to one year because she showed no significant fault or negligence in taking the banned substance. It noted that Hardy had taken far more precautions than other athletes sanctioned for using contaminated supplements. Not only had she checked the label of the bottle, she had spent a significant amount of effort determining that the source of the supplements was not connected with banned substances. The panel recognized that there were questions as to whether the small amount of the banned substance found in the supplement could have caused the positive result; however, it emphasized that Hardy did not have to prove a correlation between the concentration of the banned substance in her sample and the actual amount found in the supplement. In assessing the impact of Rule 45, the panel found that its application under the circumstances would violate the doctrine of proportionality. It also noted that the rule unilaterally altered the sanctions imposed on athletes for their doping violations, which contradicted the IOC's obligations under the World Anti-Doping Code. The panel refused to reduce Hardy's ban based solely on the rule's effect. But after noting that the IOC could appeal a decision that derogates from its rules, the panel allowed Hardy to apply for a waiver, a remedy not provided by the Olympic Charter. The panel gave her until July 31 to make a submission, and claimed that its continued jurisdiction depended on the IOC's response.

#### ANTI-TRUST LAW

Antitrust laws are designed to protect consumers by either promoting or maintaining market competition through the regulation of anti-competitive conduct. That conduct is controlled at the federal level through the Sherman Antitrust Act, which has been applied to sports entities to prevent conspiracies to restrain trade or monopolistic practices. However, not all agreements that

appear to be anti-competitive have been found illegal. In fact, courts have recognized that teams in professional sports leagues must engage in certain levels of cooperation in order to provide their product. In addition, those leagues and other associations have been allowed to enact rules that govern the conduct of athletes in order to ensure health and safety and access to an equal playing field. The following cases demonstrate how courts typically assess antitrust issues, whether they are dealing with internal league conduct or conduct as it relates to a third party.

*Deutscher Tennis Bund v. ATP Tour, Inc.*<sup>16</sup>

The ATP Tour moved for an award of attorneys' fees after successfully defending itself against antitrust claims brought by the national governing bodies for tennis in Germany and Qatar. There was no allegation that those claims were frivolous or filed in bad faith. However, shortly after the lawsuit was initiated, the ATP Tour enacted a new bylaw purporting to entitle it to attorneys' fees if it was victorious in legal disputes with its members. The court denied the motion, holding that the association's bylaw did not fit in the narrow contractual exception to the general rule governing attorneys' fees, especially when it would be contrary to the policies underlying antitrust laws. The court emphasized that it could find no cases in which a bylaw could form the basis for awarding attorneys' fees when the bylaw itself was not even at issue in the dispute. More importantly, it could find no cases in which a court awarded attorneys' fees to a private defendant in an antitrust lawsuit. The court noted that treble damages had been authorized by statute to encourage private enforcement of antitrust laws and that allowing defendants to obtain attorneys' fees would thwart the effect of that incentive.

*Pecover v. Elec. Arts Inc.*<sup>17</sup>

Electronic Arts Inc. (EA) moved to dismiss federal and state law claims brought against it by two individuals after EA allegedly cut off competition in the market to produce interactive football software by acquiring the exclusive rights to create video games using the intellectual property of the NFL, the NCAA, and the Arena Football League (AFL). The court granted the motion in part and denied it in part. It noted that the individuals had no standing to bring claims under the laws of states other than the states in which they purchased EA's Madden NFL games. However, the court held that the individuals' allegations were sufficient to support their claims that EA violated

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16. No. 07-178, 2009 U.S. Dist. LEXIS 97851 (D. Del. Oct. 19, 2009).

17. 633 F. Supp. 2d 976 (N.D. Cal. 2009).

the Sherman Act, as well as California antitrust, unfair competition, and unjust enrichment laws. In assessing the individuals' claim under section two of the Sherman Act, the court emphasized that the "indirect purchaser" doctrine" only bars antitrust claims for damages, not injunctive relief, and that the alleged product market was plausible if there was no market for software with a fictitious football setting. The court also found that EA could not rely on the Seventh Circuit's holding in *American Needle v. Nat'l Football League* because the exclusive contract in that case involved only one provider, while the case at issue involved a number of providers. In assessing the individuals' state antitrust claim, the court noted that California courts had previously determined that vertical restraints of trade—like exclusive licensing agreements—could violate the law under a rule of reason analysis.

*Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing*<sup>18</sup>

The entity that owns the Kentucky Speedway appealed a district court's decision to grant summary judgment to NASCAR and one of its affiliated companies on an antitrust claim brought against them by the entity after they refused to schedule a Sprint Cup race at the track. The entity built the Kentucky Speedway specifically for the purpose of hosting NASCAR races; however, it, it was unable to secure one of the prestigious Sprint Cup races, which are handed out by NASCAR through its affiliated company. The Sixth Circuit affirmed, holding that the entity failed to define an appropriate product market or show that they had suffered an antitrust injury. The court emphasized that the market testimony of the entity's expert witnesses did not satisfy the reliability requirements of the *Daubert* test and that the entity could not demonstrate that the defendants colluded in choosing not to award it a Sprint Cup race. The court found that the entity could show nothing more than the fact that it was a victim of the defendants' business judgment.

*Warrior Sports, Inc. v. Nat'l Collegiate Athletic Ass'n*<sup>19</sup>

After prevailing on the Warrior Sports, Inc.'s earlier motion for a preliminary injunction, the NCAA moved for summary judgment on antitrust and tortious interference claims brought against it by the lacrosse equipment manufacturer after the association decided to change the rule dictating the size of lacrosse sticks that may be used in intercollegiate competition. The NCAA first changed the rule in 2007, which rendered all of the equipment

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18. 588 F.3d 908 (6th Cir. 2009).

19. No. 08-14812, 2009 U.S. Dist. LEXIS 7717 (E.D. Mich. Jan. 30, 2009), *motion for summary judgment granted*, No. 08-14812, 2009 U.S. Dist. LEXIS 25700 (E.D. Mich. Mar. 11, 2009).

manufacturer's sticks illegal to use in competition. However, a stick made under the new rule's minimum dimensions would have violated a patent on a head design owned by the equipment manufacturer. The NCAA asked the company if it was willing to provide other manufacturers with a license to use the patent. When the company said it would not agree to license its patent in the abstract, the NCAA decided to change the rule again, reducing the minimum dimensions for the front of the stick head.

The court granted the motion, holding that the equipment manufacturer's Sherman Act claim failed because the rule was not commercial in nature, and that its tortious interference claim failed because the change was not made for an unlawful purpose. In assessing the antitrust claim, the court found that the rule did not relate to the NCAA's business activities; instead, it was directed towards increasing the quality of play on the field. The court also found that the change between the old rule and new rule did not restrict commerce because all sticks permitted under the old rule were still permitted under the new rule, and some sticks not previously permitted were made legal. It dismissed the tortious interference claim on a similar note, concluding that the latest rule change was made to increase the number of sticks that would be allowed.

#### BANKRUPTCY LAW

Bankruptcy law emerged as a prominent force in the sports world this year. In general, these laws are designed to balance the competing interests of creditors and debtors; they help creditors recoup some of their sunken investments in individuals and organizations while ensuring that debtors emerge with their financial health intact. But as shown in the following cases, both teams and individuals are attempting to use these laws to avoid their obligations in profound and often historic ways.

#### *In re Dewey Ranch Hockey, LLC*<sup>20</sup>

After the court denied a motion for an order that would allow the then-owners of the Phoenix Coyotes to sell the franchise out of bankruptcy free and clear of all encumbrances, the NHL and a limited partnership owned by Canadian billionaire Jim Balsillie made separate bids to purchase the club. The NHL's bid was \$140 million, reduced by funds that the league had advanced to the franchise since late 2008 in order to pay its operating losses. The league also promised to keep the franchise playing at its current home through the 2009-10 season while it looked for a local purchaser. Balsillie's bid ran

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20. 406 B.R. 30 (Bankr. D. Ariz. 2009), *sale denied*, 414 B.R. 577 (Bankr. D. Ariz. 2009).

anywhere from \$52.5 million to \$72.5 million dollars higher than the NHL's bid, depending on whether the City of Glendale accepted his \$50 million offer to terminate their facility lease agreement so he could move the franchise to Hamilton, Ontario. Although Balsillie originally wanted to move the team prior to the 2009-10 season, he subsequently indicated that he would be willing to keep it in Arizona until the following year. However, awarding the team to Balsillie without approval of the league would circumvent the NHL Bylaws, which prohibit the transfer of ownership or relocation of a franchise without the consent of at least seventy-five percent of the league's owners.

Balsillie sought approval in the months prior to the auction date, but the league rejected his application, citing character issues. It claimed that he had engaged in bad faith negotiations during two previous attempts to acquire a franchise, and that his conduct during the bankruptcy litigation had subjected the NHL to public ridicule. But even if the league had approved his application, there were doubts about whether he could still relocate the franchise. In addition to the restrictions in the bylaws, the NHL Constitution gives each club the right to veto any proposed relocation that would infringe upon its territorial rights, which extend to any area within fifty miles of the city where it is located. Under that definition, the Toronto Maple Leafs appear to have territorial rights over Hamilton, which is located just forty miles from the provincial capital. Unless Balsillie's \$50 million offer was accepted, the facility lease agreement also appeared to lock the Coyotes into playing in the desert through 2035. It provided that the City of Glendale would be able to seek specific performance to ensure the team's home games were played in its new arena, which was built in exchange for the franchise's commitment to stay in Arizona.

The court denied Balsillie's bid with prejudice and denied the NHL's bid without prejudice. In assessing Balsillie's bid, the court noted that the bankruptcy laws allowed it to sell an asset free and clear of any purported interests that were subject to a "bona fide dispute." However, even assuming that the interests of the NHL and the City of Glendale were subject to such a dispute, the court could not accept his bid. It emphasized that other laws required courts to provide adequate protection to all interests at stake, and that the proceeds of a sale would not protect the league's right to determine who can own a franchise and where those franchises will be located. In turning down the NHL's bid, the court emphasized that the league could not select the unsecured creditors it would pay in full, thereby preventing the debtor and former Coyotes coach Wayne Gretzky from recouping their personal loans to the team. It found the proposed distribution inconsistent with one of the policy of treating similar creditors equally, and that the league had failed to give a compelling reason for its exclusions.

*Top Rank, Inc. v. Ortiz (In re Ortiz)*<sup>21</sup>

Boxing match promoter Top Rank, Inc. appealed a bankruptcy court's decision to grant summary judgment to boxer Victor Ortiz on his claims for declaratory and injunctive relief from the promoter's attempt to enforce their executory contract with an exclusivity clause. The bankruptcy court held that it rejected the contract was rejected by law because the trustee failed to assume the boxer's obligations under it. Ortiz claimed the Top Rank, Inc. interfered with his efforts to enter into a contract with Golden Boy Productions, another boxing promoter, by asserting that its agreement was still valid. The district court reversed, holding that the bankruptcy court erred in concluding that the trustee's decision terminated the contract under state law and that the exclusivity provision was unenforceable as an unreasonable restraint of trade. The district court emphasized that the trustee's decision had no effect on the contract's continued existence; therefore, Top Rank, Inc. could seek damages against Ortiz's estate or any number of equitable remedies if monetary payments were not a viable alternative. The court concluded that the reasonableness of the exclusivity provision should not have been addressed because Top Rank, Inc. had no notice that its enforceability was at issue, and there was not enough evidence to make a reasoned determination.

## CONSTITUTIONAL LAW

Constitutional law provides individuals with varying types of protection from the acts of the government, whether at the federal or state level. Most of the constitutional issues in the field of sports law arise out of disputes involving government entities, educational institutions, athletic associations, and student-athletes. However, courts have firmly established that participation in high school or collegiate athletics is not a protected interest under the Fourteenth Amendment. This area of the law is also rarely applied to the decisions of private associations and leagues. In the absence of search and seizure issues, courts have almost always deferred to their judgment and allowed them to conduct their business in any manner they see fit. The following cases provide a broad glimpse at how constitutional issues have been tackled, including those arising out of the federal government's high-profile investigation of steroid abuse in Major League Baseball.

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21. 400 B.R. 755 (C.D. Cal. 2009).

*Cornerstone Christian Sch. v. Univ. Interscholastic League*<sup>22</sup>

A parochial school, one of its student-athletes, and the student-athlete's parents appealed a district court's decision to grant the University Interscholastic League's (UIL) motion to dismiss their claims that the athletic association violated the First and Fourteenth Amendment when it denied the school an opportunity to become a member. The school had previously been a member of the Texas Association of Private and Parochial Schools, but that organization voted not to renew its annual contract with the school after discovering that the school had committed various recruiting infractions. The UIL rules prohibited non-public schools from applying for membership unless they could establish that they did not qualify for membership in any similar organization and they had not had their right to participate revoked by a similar organization for violating that organization's rules.

The Fifth Circuit affirmed, holding that the UIL rule did not infringe the plaintiffs' First or Fourteenth Amendment rights because it was a neutral regulation that just happened to place an incidental burden on the free exercise of religion. In assessing the First Amendment claim, the court emphasized that the rule did not distinguish between different types of non-public schools and did not deny any students the right to practice their faith. After assessing the Fourteenth Amendment claims, the court concluded that the rule did not unduly restrict the student-athlete's parents' substantive due process right to control the education of their child because it did not prohibit them from enrolling the child at the parochial school or place any restriction on the exercise of that choice. The court found that the rule did not violate equal protection mandates because its distinction between public and non-public schools was not based on a suspect classification and was rationally related to a legitimate state interest.

*Jones v. Wash. Interscholastic Activities Ass'n*<sup>23</sup>

A public high school football coach appealed a district court's decision to grant summary judgment to the Washington Interscholastic Activities Association (WIAA) on the coach's claim that the association's out-of-season coaching rule violated the Equal Protection Clause of the Fourteenth Amendment. The Ninth Circuit affirmed, holding that the rule was subject to rational basis review and passed muster under that standard because it was rationally related to the WIAA's legitimate state interest in creating equitable competition among student-athletes. In assessing the type of scrutiny to apply

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22. 563 F.3d 127 (5th Cir. 2009).

23. 342 Fed. Appx. 264 (9th Cir. 2009).

to the rule, the court emphasized that the plaintiff's contractual right to coach football did not equate to a fundamental right, and that football coaches were not a suspect class subject to extra protection. The court also noted that any disparity between the treatment of public and private school coaches under the rule was permissible because parallel regulatory schemes do not have to be identical; as long as the schemes were both rationally related to legitimate state interests, public school coaches could be forced to work within smaller geographic boundaries.

*Ladd v. Uecker*<sup>24</sup>

Ann Ladd appealed a trial court's decision to deny her motion to vacate or modify an injunction issued by a court commissioner that barred her from attending baseball games being called by Milwaukee Brewers radio broadcaster Bob Uecker. The injunction was issued after Uecker obtained a temporary restraining order to prevent Ladd from continuing to stalk him. She claimed that the order violated her Fourteenth Amendment right to travel. The appellate court affirmed, holding that the injunction was reasonable given Ladd's repeated harassment of Uecker. The court emphasized that restrictions on an individual's right to travel do not violate the federal constitution as long as they are narrowly crafted to protect the person being harassed.

*Lopera v. Town of Coventry*<sup>25</sup>

Four police officers employed by the Town of Coventry moved for summary judgment on Fourth Amendment, Fourteenth Amendment, and state law claims brought against them by former members of a high school boys soccer team after the officers subjected them to a search for allegedly stolen property in front of an angry mob of students and adults following a road game at another high school. The Town and its current and former police chiefs also moved for summary judgment on Fourteenth Amendment claims brought against them for failing to train the officers. Following the game, the team's coach was intercepted on his way to the team's bus by a large group of the other school's football players, who then accused members of the team of stealing electronic devices from a locker room. The coach responded by searching the bags of every member of the team on the bus, but none of the allegedly missing items were discovered. However, by the time the search was completed, the football players had been joined by at least thirty more

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24. No. 2009AP444, 2009 Wis. App. LEXIS 931 (Dec. 8, 2009), *aff'd*, 2010 Wis. App. LEXIS 60 (Jan. 27, 2010).

25. 652 F. Supp. 2d 203 (D.R.I. 2009).



individuals, made up of the other school's students and several adults. The mob began shouting racist remarks at the team, and claimed it would not disperse until the missing items were turned over. Shortly afterwards, the four defendant police officers arrived on the scene. The coach brought the officers up to speed on the situation, including his search of the players' bags. However, the officers wanted to conduct their own investigation, and the coach consented to another search of the team. The players were ordered off the bus and told to stand with their backs against the bus while the officers searched their belongings. Some members of the team were also subjected to pat downs. The entire search lasted approximately one hour, but at no point during that time did the officers make an effort to disperse the mob, which continued verbally assaulting the players. Once again, none of the allegedly missing items were discovered.

The court granted the motions on all of the plaintiffs' claims. It held the officers were entitled to qualified immunity on the Fourth Amendment and state law invasion of privacy claims, and that a reasonable jury could not conclude their conduct was racially motivated, which foreclosed the plaintiffs' § 1983 equal protection claim and state law racial profiling and ethnic intimidation claims. In assessing the Fourth Amendment and invasion of privacy claims, the court found that the law regarding permissible public school searches was not so clearly established as to give the officers notice that a chaperoning coach could not consent to a search of his players *in loco parentis*. It emphasized that the officers could have reasonably believed that they could rely on the coach's consent, so they were entitled to immunity from liability for their subsequent acts. The court also noted that a written police policy and a state law regulating the interrogation of minors could not clarify the state of federal constitutional law. In assessing the equal protection and state law claims based on racial discrimination, the court found that nothing could be inferred from the facts that suggested the officers singled out the plaintiffs. It noted that the coach had informed the officers that the team was under suspicion, and the search only took place following his consent. The court held the police chiefs could not be found liable for failing to train the officers because, even assuming a constitutional violation occurred, there was no history of abuse in conducting searches of public school students that would suggest they were deliberately indifferent to the plaintiffs' rights. Finally, the court held the Town of Coventry could not be found liable for failing to train the officers because, again, assuming a constitutional violation occurred, there was no evidence that the officers' actions were dictated by a known, widespread policy or custom that was deliberately indifferent to the plaintiffs' rights.

*Mancuso v. Mass. Interscholastic Athletic Ass'n*<sup>26</sup>

High school swimmer Elizabeth Mancuso appealed a judgment affirming the Massachusetts Interscholastic Athletic Association's (MIAA) decision to deny her a waiver to compete on her high school's team as a senior because she had repeated her freshman year after transferring from another school. The Massachusetts Supreme Court affirmed, holding that the MIAA did not deny Mancuso due process in declaring her ineligible or violate her right to equal protection in applying its fifth-year student rule. In dismissing the due process claim, the Court emphasized that Mancuso had no property interest in participating in interscholastic athletics. In dismissing the equal protection claim, the Court found that she was not treated differently from similarly-situated high school swimmers because there was no evidence that swimmers previously granted waivers had attended high school for five years. Even if Mancuso was treated differently, the Court determined that she was not subjected to invidious discrimination because there was no evidence that the MIAA denied the waiver solely because she had competed for a private swim club during her freshman year at her previous school. Finally, the Court held that the MIAA restitution and seeding rules did not violate Mancuso's rights under the state's civil rights legislation because they did not constitute unlawful means of discouraging her from litigating the eligibility dispute.

*Sala v. Warwick Valley Cent. Sch. Dist.*<sup>27</sup>

A public school district, its superintendent, and its high school football coach moved for summary judgment on claims brought against them by the father of one of the high school's football players after his son was dismissed from the team in the middle of the season and then sparingly played when he was later reinstated through a court order. The dismissal took place after the player had run-ins with both law enforcement and school authorities earlier in the season. In the first incident, the player and three of his teammates were caught in possession of a small amount of marijuana and drinking at his parents' home. When none of his teammates claimed ownership of the drug, the player was arrested and later suspended from the team for the remainder of the season. Following an appeal, the district and the player's father entered into a settlement agreement, reducing the suspension to four weeks as long as the player adhered to the school's code of conduct. However, just a few weeks later, the player was observed speeding in the school's parking lot following a game. When a school employee urged him to slow down, the player allegedly

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26. 900 N.E.2d 518 (Mass. 2009).

27. No. 06 CV 8185 (HB), 2009 U.S. Dist. LEXIS 67353 (S.D.N.Y. July 29, 2009).

responded in a profane manner. Later, he was ticketed for remaining in the lot past curfew. The following week, the coach kicked the player off of the team. On another appeal to the district, the player's father was given an opportunity to defend his son's latest actions. But, he failed to present any evidence to support his arguments, and the superintendent sustained the decision. Subsequently, the player's father filed the instant lawsuit and obtained a permanent injunction that forced the school to place his son back on the team. The school complied with that order, but the coach chose to limit the boy's playing time despite previously acknowledging him as one of the stars of the team.

The court granted the motion for summary judgment, holding that the player's father could not prove his constitutional rights were violated or that the defendants breached their settlement agreement. In assessing the procedural due process claims, the court did not discuss whether the player had been deprived of a protected interest because the defendants had afforded his father "all the process that was due." It determined that he had been given an opportunity to be heard throughout the appeals process and that he had been properly notified of the reasons supporting the district's decision. In assessing the substantive due process claims, the court emphasized that the player did not have a constitutional right to participate in interscholastic athletics, and that, even if he did, the defendants' conduct was not egregious enough to be actionable. After assessing the First Amendment retaliation claim, the court concluded that there was no evidence linking the father's decision to initiate the lawsuit and the coach's later decision to limit the boy's playing time. It noted that the coach had provided legitimate reasons for his decision, which were entitled to a large degree of deference from the court. Finally, in dismissing the breach of contract claim, the court emphasized that the settlement agreement only created only conditions precedent to the player's reinstatement, not a bar that immunized him from his future transgressions.

*Sharon City Sch. Dist. v. Pa. Interscholastic Athletic Ass'n*<sup>28</sup>

High school basketball player Brittany Benedetto and her local school district moved for a preliminary injunction in a lawsuit that they brought against the Pennsylvania Interscholastic Athletic Association (PIAA) after it allegedly violated the federal and state constitution when it suspended Benedetto for her school's first playoff game. Benedetto had been ejected from the school's previous contest for her role in an altercation with an opposing player, and the PIAA rules dictated that any player tossed from a

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28. No. 9-213, 2009 U.S. Dist. LEXIS 13037 (W.D. Pa. Feb. 20, 2009).

game for unsportsmanlike conduct was disqualified from participating in her school's next contest. Benedetto claimed that the penalty was arbitrary and capricious because she was only acting in self-defense and that she was not given due process because the rules did not provide an opportunity to appeal. The court denied the motion, holding ineligibility for participation in interscholastic athletics alone does not constitute the irreparable harm needed to grant an injunction. The court also emphasized that the school district had no underlying property interest in its reputation for winning games, and that Benedetto's reputation could be restored during trial if she was actually acting in self-defense.

*Sheehan v. San Francisco 49ers, Ltd.*<sup>29</sup>

Two San Francisco 49ers season-ticket holders appealed a decision affirming a judgment that dismissed their claim that the team violated their state constitutional right to privacy by implementing an NFL policy requiring all fans to submit to a pat-down prior to entering a stadium. The California Supreme Court reversed, holding that there were not enough facts in the complaint to establish that the plaintiffs failed to state a cause of action. The Court noted that the policy was likely implemented to enhance spectator safety, but found that it could not rule on whether there was a significant intrusion on the plaintiffs' privacy interests because it had to determine if they had a reasonable expectation of privacy under the circumstances. The Court also concluded that the record lacked enough facts to find that the plaintiffs consented to the search policy when they purchased the season tickets because a person can only consent to intrusions that are reasonable, which requires a court to balance the intrusion against the team's proffered justifications according to a variety of different factors.

*United States v. Comprehensive Drug Testing, Inc.*<sup>30</sup>

The federal government appealed three district court orders related to its seizure of drug testing records and urine samples for hundreds of Major League Baseball (MLB) players from an independent business that administered the MLB drug testing program approved in the 2002 collective bargaining agreement. Under the program, all urine samples and drug testing records were to remain anonymous and confidential, and unless more than five percent of the players tested positive for performance-enhancing substances during the first year of the program, there would be no testing in future

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29. 201 P.3d 472 (Cal. 2009).

30. 579 F.3d 989 (9th Cir. 2009).

seasons. However, that same year, the government began investigating the Bay Area Laboratory Co-Operative (BALCO), which was later found to have provided performance-enhancing substances to several prominent athletes. During that investigation, the government was notified of several players who had tested positive under the MLB program. Subsequently, it obtained two warrants. The first warrant, issued in the Central District of California (CDC), allowed it to search the drug testing administrator's facilities, but was limited to the drug testing records of the ten players as to whom the government had probable cause. The second warrant, issued in the District of Nevada, allowed the government to seize the urine samples of players from a laboratory in Las Vegas. The government also obtained subpoenas, issued in the Northern District of California, which demanded that the drug testing administrator produce the records that had already been seized. Because the government exceeded the scope of the CDC warrant, both the drug testing administrator and the MLB Players' Association (MLBPA) moved for the return of the drug testing records and urine samples—except for the materials related to the ten previously identified players—and to squash the subpoenas. The courts in all three districts granted the motions, chastising the government for failing to follow the procedures specified in the CDC warrant.

The Ninth Circuit affirmed two of the orders and dismissed the third order as untimely. However, in assessing the CDC's order, the court noted that all factual determinations and issues resolved against the government were binding in the other two jurisdictions. In that case, the court held the government did not comply with the directive to segregate all information related to the ten players as to which it had probable cause from information related to other players because the initial screening of the data on the drug testing administrator's computers was conducted by the investigating agents instead of specially-trained computer personnel. In affirming the order from Nevada, which mandated the return of the urine samples, the court emphasized the preclusive effect of the CDC order and a previous order from the Northern District of California that found the failure to segregate information covered by the warrant from information that was not covered by the warrant was illegal when both types of data were included in a directory viewed by case agents. The court determined that the plain view doctrine could not apply to the information contained in the directory because the government would have an incentive to seize as much material as possible, and that the plaintiffs could rely on Rule 41(g) of the Federal Rules of Criminal Procedure to obtain the return of seized material. The court noted that the MLBPA was likely to suffer irreparable damage if the additional seized materials were not placed back under lock and key, and that the government could not benefit from its own wrongdoing by retaining illegally-obtained evidence. Finally, in affirming the

order to quash the subpoenas issued in the Northern District of California, the court concluded that there was no abuse of discretion in finding them unreasonable in light of the illegally-obtained evidence. It also recognized that the subpoenas were only an insurance policy designed to keep the plaintiffs from litigating the legality of a previously-obtained order that purported to give the government access to all drug testing records and urine samples in the drug testing administrator's possession.

#### CONTRACT LAW

Contract law is a creature of the centuries-old common law system that has been preserved in many states' statutory schemes. It is also the most important body of law in the world of sports. All relationships between athletes, coaches, leagues, and schools are governed by contractual terms, as are their relationships with outside parties. They are particularly important when assessing whether liability can be imposed for tortious conduct and, if so, whether the risk of incurring it can be shifted to another legal entity. The follow cases deal with a host of contract issues that have challenged courts in 2009.

#### *Balyszak v. Siena Coll.*<sup>31</sup>

The United States Volleyball Association (USVBA) and its insurers appealed a trial court's decision to partially grant Siena College's motion for summary judgment on its cross claim for indemnification in a negligence lawsuit brought against it by an individual that suffered injuries when a referee's platform collapsed during a USVBA-sponsored tournament at the school. The USVBA rented the tournament facility under a contract that stated that the association would indemnify the school for any claims of injury arising out of the rental period and provide it with a certificate of insurance that named the school as an additional insured entity on its liability policy. The certificate issued stated that the school was insured only against claims arising out of the USVBA's negligence. There were genuine issues of fact as to whether negligence by the school or the USVBA was the cause of the plaintiff's injuries. The appellate court affirmed, holding that the facility rental agreement required the USVBA to indemnify the school in the event of future liability caused by either of their negligence. The court noted that language in similar agreements had also been interpreted to extend indemnification even if the party being indemnified was at fault. Finally, the court found that the contractual liability provision in the USVBA's insurance policy gave rise to a

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31. No. 506012, slip op.882 N.Y.S.2d (App. Div. June 18, 2009).

duty to indemnify Siena. The provision provided coverage for contractual duties to indemnify that were later assumed by the USVBA.

*Bill A. Duffy, Inc. v. Scott*<sup>32</sup>

Athlete-agent Merle Scott moved for partial summary judgment in a lawsuit brought against him by the athlete representation agency that used to employ him. The agency also moved for partial summary judgment on Scott's counter-claims for tortious interference with his alleged contractual relationships with NBA player Leandro Barbosa and tortious interference with his prospective economic relationship with NBA player Brandon Wright. Scott had induced Barbosa to enter into a standard representation agreement and negotiated an endorsement deal on his behalf while he worked at the agency. The agency's claims arose out of Scott's decision to keep all of the payments provided for under those contracts even though his understanding of his oral agreement with the agency was that they would split the payments down the middle. In the event of a dispute, the NBA Players' Association (NBPA) rules dictate that all payments under player contracts should be made to the agent of record. Scott was the agent of record in the standard representation agreement, but not in the endorsement deal.

The court granted Scott's motion on the agency's conversion claim, but denied the agency's claims for money had and received and constructive trust. In dismissing the conversion claim, the court concluded that the agency only had a contractual right of payment, not a property interest. But in upholding the agency's remaining claims, the court emphasized that the NBPA rules do not establish that the agent of record is entitled to keep all payments under player contracts and that the endorsement deal actually stipulated that the commission was to be paid to the agency. The court also granted the agency's motion on both of Scott's counter-claims. In assessing whether the agency tortiously interfered with his alleged contractual relationships with Barbosa, the court concluded that the agency did not disrupt the standard representation agreement because Scott continued to receive his payments from the player and could not have disrupted the endorsement deal because he was never a party to it. In assessing whether the agency tortiously interfered with the prospective economic relationship with Wright, the court noted that the alleged conduct had to be independently wrongful for a claim to be actionable, and found that Scott had failed to establish the acts of agency employees during a meeting with Wright, his mother, and his college coach violated any law.

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32. No. C-08-00878 EDL, 2009 U.S. Dist. LEXIS 35667 (N.D. Cal. Apr. 27, 2009).

*Bires v. WalTom, LLC*<sup>33</sup>

An auto racing team that runs a driver development program moved for summary judgment on seven of eight claims brought against it by current NASCAR Nationwide Series driver Kelly Bires after the team allegedly entered into an oral driving agreement with Bires and then later forced him to enter into a written agreement with different terms, including a provision that entitled the team to twenty-five percent of all royalties earned or received by Bires as a result of his activities in the racing industry over the next ten years. Bires also moved for judgment on the pleadings on four of those claims. Bires joined the team's program in late 2005 in hopes of securing a driver position in the ASA Late Model Series (LMS) the following season. In December 2005, Bires signed an agreement that prohibited him from negotiating for a driving position on another team for a period of forty-five days. He alleged that he had no choice but to sign the agreement based on the surrounding circumstances. As a result, Bires claimed that he forfeited opportunities to secure other employment. Later that month, Bires received a telephone call from the team's owner that purportedly included a formal offer to drive for the team the following season. He claimed that later conversations solidified the terms of that offer, and altogether resulted in an oral contract to drive in the LMS in 2006. According to Bires, the team never indicated that its promises would not be binding until a written agreement was signed, or that he would have make future royalties payments. Nevertheless, the team presented him with a written driving agreement late the following month. Bires initially refused to sign it, but later relented because it would have been too late to find another full-time driving position for the 2006 season. After capturing Rookie of the Year honors in his only season with the team, Bires made over \$850,000 with other outfits over the next two years, when he competed in the high-level NASCAR series.

The court granted the team's motion in part and denied it in part, and granted Bires's motion in part and denied it in part. After assessing Bires's claim under the Illinois wage assignment statute, the court granted the team's motion, emphasizing that the royalties provision was not a wage assignment because it was not used to secure an existing debt. However, the court granted Bires's motion on his ensuing two claims, holding that the contract was null and void because it lacked adequate consideration and constituted an illegal restraint of trade. It found the royalties provision amounted to a restrictive covenant under state law, and that Bires's one-year tenure as a team driver was insufficient consideration for that type of clause. More importantly, the court

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33. 662 F. Supp. 2d 1019 (N.D. Ill. 2009).



determined that the covenant itself was unreasonable, rendering the provision illegal under state law. It emphasized that the royalties provision imposed a large penalty upon Bires if he continued to compete as a driver, and that its scope was not properly limited. Not only did it extend the covenant for up to nine years beyond the term of his employment with the team, but also applied it to activities that were not directly connected with the team's racing activities. In addition, the covenant failed to include a geographic restriction, and there were doubts as to whether it actually served to protect the team's legitimate business interests. The court moved on to deny the team's motion on Bires's unconscionability claim, noting there was a dispute over the costs incurred by the team during the 2006 season, as well as its motion on Bires's claim under Illinois's consumer fraud statute, which was not based exclusively on the alleged breach of the oral agreement between the parties. Finally, based on its previous conclusion that the entire contract was null and void, the court directed the parties to file position papers as to how the remaining claims would be affected.

*Brotherson v. Prof'l Basketball Club, L.L.C.*<sup>34</sup>

Former season-ticket holders of the Seattle Supersonics moved for summary judgment on claims that they brought against the Supersonics after they entered into contracts giving them fans the right to renew their tickets for future seasons and then the team moved to Oklahoma City following the 2007-08 campaign. The team also moved for summary judgment on those claims. The contracts were allegedly formed in the spring of 2007, although there were doubts at that time as to whether the team would remain in Seattle. The state legislature had denied a proposal to finance a new basketball facility in the city, and there were reports that the team was considering relocation. Nevertheless, the Sonics sent out brochures to current season ticket holders with an offer to join its newly-created Emerald Club. By renewing their tickets for the 2007-08 season, those ticket holders would lock in 2006-07 ticket prices for the next three years and receive a number of fringe benefits. The brochure acknowledged that there was uncertainty as to whether the team would remain in Seattle beyond the 2009-10 season, but did not suggest the Sonics might relocate prior to the expiration of their lease of Key Arena.

The court granted the ticket holders' motion on contract liability in part, holding that they had entered into valid contracts that gave them the option of renewing their tickets for future seasons at 2006-07 ticket prices. The court emphasized that the brochure failed to mention if the tickets were revocable,

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34. 604 F. Supp. 2d 1276 (W.D. Wash. 2009).

and that the license printed on them only allowed the team to revoke access on a per-game, post-entry basis. It also concluded that uncertainty over the team's future did not create a condition precedent to the ticket holders' right to exercise their options and that the ticket holders' doubts as to whether the team would stay did not affect the validity of the contracts. The court could not determine whether the team breached those contracts because the ticket holders may have waived or forfeited their options by not indicating that they intended to exercise them. However, it denied the team's motion on contract damages, emphasizing that the ticket holders could have sold the tickets for games in Oklahoma City. Finally, the court granted the team's motion on the ticket holders' prayer for specific performance and claim under Washington's consumer protection law. It noted that the ticket holders only wanted the ability to purchase tickets in order to resell them to Oklahoma City fans, so damages were an adequate remedy. In assessing the state law claim, the court determined that the ticket holders were not entitled to a refund of the purchase price for their 2007-08 tickets because they were able to attend the games and take advantage of the Emerald Club benefits.

*Charlotte Motor Speedway, Inc. v. Tindall Corp.*<sup>35</sup>

The Charlotte Motor Speedway (CMS) appealed a trial court's decision to grant the Tindall Corporation's motion to dismiss indemnification claims brought against it by the CMS after the CMS was found liable for injuries suffered by pedestrians when a walkway attaching the speedway to a parking area collapsed during a NASCAR race in May 2000. The construction contract entered into by the CMS and the Tindall Corporation included a clause that required the contractor to indemnify the CMS against liability arising out of personal injury claims, but only during the performance of the work. The appellate court affirmed, holding that the express indemnification provision in the contract barred the CMS from bringing a claim based on an implied-in-law theory of indemnification. The court also emphasized that the CMS was found liable to the pedestrians on purely contractual bases. Trial courts had held that the CMS was responsible for their injuries for breaching a non-delegable duty and its agreement with the North Carolina Department of Transportation. The latter agreement required the CMS to construct the walkway in accordance with state standards, and the pedestrians were considered third party beneficiaries of that agreement.

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35. 672 S.E.2d 691 (N.C. Ct. App. 2009).

*Edwards v. Doug Ruedlinger, Inc.*<sup>36</sup>

A school board appealed a trial court's decision to grant summary judgment to a high school football coach's professional liability insurer on its cross-claim for indemnification in a personal injury lawsuit brought against the coach and others by a high school football player who was rendered a quadriplegic following a collision during a game. Louisiana law provided that school boards had to subrogate and indemnify any public school employee sued for damages by a student for injuries caused by the employee's acts or omissions in the proper course of his duties. However, the defendant school board relinquished its defense to the insurance company, and the coach subsequently entered into a consent judgment with the player for \$550,000. The appellate court affirmed, holding that the insurance company could be subrogated to the coach's right of indemnification, even through a consent judgment. The court noted that the school board's legal obligations were not strictly personal or conditioned upon the absence of personal malpractice coverage. It concluded that the settlement was reasonable under the circumstances.

*Front-Line Promotions & Mktg., Inc. v. Mayweather Promotions, LLC*<sup>37</sup>

Mayweather Promotions, LLC and six-time world boxing champion Floyd Mayweather, Jr. moved for partial summary judgment on breach of contract claims brought against them by two marketing companies after the companies and the defendants allegedly entered into a deal requiring Mayweather to appear at an event during NBA All-Star Weekend in New Orleans in 2008 and Mayweather failed to show. In a later action, Mayweather also moved for partial summary judgment on a negligence claim that the companies brought solely against him. The marketing companies had previously entered into an agreement to produce the event, and each of them was required to procure the attendance of certain celebrities. Front-Line Promotions & Marketing (Front-Line) agreed to secure Mayweather, and signed a deal with a woman who worked for Mayweather Promotions, LLC and purported to be the boxer's talent representative.

The District Court denied the motion on the breach of contract claims brought by Front-Line, but granted the motion on the breach of contract claims brought by the second marketing company. The court found that the second

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36. 2008-0772 (La.App. 4 Cir. 03/11/09); 9 So. 3d 279, 3d 279 (La. Ct. App. 2009).

37. No. 08-3208 SECTION I/4, 2009 U.S. Dist. LEXIS 27136 (E.D. La. Mar. 31, 2009), *partial summary judgment granted by* No. 08-3208 SECTION I/4, 2009 U.S. Dist. LEXIS 34809 (E.D. La. Apr. 24, 2009).

marketing company did not have standing to bring its claims because there was no indication that the defendants knew they were contracting with a partnership. In assessing the claims brought by Front-Line, the court concluded that there was a genuine issue as to whether the woman who purported to be the boxer's talent representative had the authority to book appearances on his behalf. In the later action, the court granted the motion on the negligence claims brought against Mayweather, emphasizing that the boxer could not be held liable in tort unless he owed a legal duty that was independent from any duty created by the alleged contract. It held that Front-Line's claim was merely co-extensive with its breach of contract claim, and that Mayweather did not owe a duty to the second marketing company.

*Giacomelli v. Scottsdale Ins. Co.*<sup>38</sup>

Two horse racing jockeys appealed a trial court's decision to grant summary judgment to an insurance company in their action for a judgment declaring that the company had to indemnify the lessee of a horse racing facility and the county that owned the facility against liability incurred in a lawsuit filed by the jockeys after they were injured during a race. The policy issued by the insurance company claimed to except "special event participants" and "athletic or sports participants" from coverage. The jockeys settled their lawsuit with the lessee and the county. Under that agreement, the lessee and the county consented to the entry of judgment against them, but the jockeys agreed not to enforce those judgments. Instead, the lessee and the county assigned any claims that they had against insurance company to the jockeys. The jockeys claimed that a Montana law required entities that were licensed to conduct horse races to have insurance that covers jockeys, which would have invalidated the two exceptions in the lessee's policy as violations of public policy. The Montana Supreme Court affirmed, holding that the term "exhibitor" in the state statute that applied to entities licensed to conduct horse races did not cover jockeys because they were participants in the race. The Court emphasized that the exceptions in the insurance policy were not ambiguous and that it was not reasonable for the lessee or the jockeys to expect the insurance to cover the jockeys' injuries in light of those exceptions.

*Giuliani v. Duke Univ.*<sup>39</sup>

Duke University and its men's golf coach moved to dismiss claims brought against them by former Duke golfer Andrew Giuliani after he was

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38. 2009 MT 418, 354 Mont. 15, 221 P.3d 666221 P.3d 666 (Mont. 2009).

39. No. 1:08CV502, 2009 U.S. Dist. LEXIS 44412 (M.D.N.C. May 19, 2009).

dismissed from the team and barred from the program's practice facilities. Giuliani committed to Duke while the team was still being coached by Rod Myers, who allegedly promised Giuliani lifetime access to the program's facilities and the opportunity to compete for an NCAA championship. However, Giuliani never signed a letter of intent or received an athletic scholarship. The court granted the motion, holding Giuliani did not have a valid contract to play on the team or use the program's facilities. It emphasized that he could not rely on the provisions of non-binding student policy manuals, which could not create a legally binding agreement under North Carolina law because they could be unilaterally altered by the university at any time.

*Halpern v. Greene*<sup>40</sup>

Undefeated middleweight boxer Joe Greene and his father moved to dismiss claims brought against them by the boxer's unlicensed former managers after Greene allegedly breached their management agreement to allow his father to take over as his manager. The plaintiffs met Greene in 2005 when he was an aspiring amateur boxer. Shortly afterwards, they induced him to enter into a management agreement, under which they provided him with substantial financial assistance and professional support over a two-year term. During that time period, Greene boxed his way into the top ten of the world rankings. In 2007, the parties renewed the management agreement for another three years, under which the plaintiffs agreed to pay Greene's father over \$20,000 for his involvement his son's career. Later that year, the plaintiffs sought to hire a promoter to give Greene better exposure in the boxing community. However, Greene's father persuaded the boxer to demand a \$40,000 signing bonus, and the promoter balked. As a result, the plaintiffs had to secure the requested bonus from another source. Over the next year, Greene's father took steps to supplant the plaintiffs as his son's manager, minimizing contact between the parties and dealing with the promoter without the plaintiffs' assistance. At one point, he also prohibited the plaintiffs from seeing his sons following a fight in Madison Square Garden. Nevertheless, the plaintiffs continued to pay the boxer's training expenses. By the time Greene cut off communications with the plaintiffs, they had spent more than \$225,000 on his career, and had not yet received any commissions under the renewed agreement.

The court granted the motion in part and denied it in part. First, it held that the plaintiffs' claims for breach of contract and tortious interference with

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40. 24 Misc. 3d 1251A (N.Y. Sup. Ct. 2009).

contract were barred because the management agreements could not be enforced. The court emphasized that state law required all boxing managers and promoters to be licensed, and that all contracts entered into with unlicensed individuals were void as a matter of law. It noted that licensing requirements enacted to generate revenue would not defeat a contract, but that the regulations at issue were not designed for that purpose; instead, they paralleled the Muhammad Ali Act, which was designed to protect professional boxers from exploitive and unethical management practices. However, the court refused to dismiss the plaintiffs' unjust enrichment claim, emphasizing that some of their financial contributions were allegedly unconnected to their role as Greene's managers. If true, those payments would be recoverable, because the state regulations were designed "to act as a shield, not as a sword for the boxer's personal gain."

*Luchs v. Pro Tect Mgmt. Corp.*<sup>41</sup>

Athlete-agent Joshua Luchs (Luchs) appealed a trial court's decision to enter judgment on a verdict in favor of the a now -defunct athlete representation agency, Pro Tect Management Corporation (PTMC). and its sole shareholder, athlete-agent Gary Wichard (Wichard), on Luchs's claim against PTMC for breach of contract. Under their employment agreement, Luchs recruited NFL players to PTMC , and PTMC paid him a percentage of the commissions on any players that it retained, minus any stipulated expenses. A non-compete provision barred Luchs from retaining the players that he recruited if he left PTMC, unless he received written approval from the shareholder. The commission arrangement was to remain in place for the players that he recruited as long as either Luchs or PTMC continued to represent them. When Luchs left the agency, two players that he had recruited subsequently fired PTMC and retained him; however, Luchs had not received approval to sign them. Soon after, PTMC terminated its agreement with Luchs, claiming that he had forfeited his right to future commissions because he breached the non-compete provision and failed to forward a payment that was due from one of the two players that he had lured away.

The appellate court affirmed, holding there was no error in (1) refusing to enter a default judgment against PTMC, (2) instructing the jury regarding the legal relationship between the corporation and its shareholder, and (3) finding the verdict was supported by substantial evidence. In assessing whether the default judgment should have been entered or whether the jury was incorrectly instructed, the court noted that PMTC was the Wichard's alter ego, so

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41. No. B201186, 2009 Cal. App. Unpub. LEXIS 3893 (Cal. App. 2d Dist. May 18, 2009).

PTMC's liability was dependent upon Wichard's liability. The court emphasized that Luchs proceeded to trial only against Wichard, and that Wichard agreed to be personally responsible for any judgment against the agency. In assessing whether the verdict was adequately supported, the court found ample evidence to back the conclusion that PMTC was entitled to terminate Luchs's employment agreement for cause.

*Luzzi v. ATP Tour, Inc.*<sup>42</sup>

The ATP Tour (ATP) moved to dismiss claims brought against it by several European tennis players after they signed a brief consent form that the players thought pertained only to the ATP anti-doping policy, but actually purported to bind them to the ATP's rulebook, which was later relied on to suspend them from competition and fine them for gambling on the sport. After acquiring the players' online wagering records, the ATP began administrative proceedings against them, including two hearings in Florida. After the conclusion of those hearings, the players sued in the Southern District of Florida, seeking a declaratory judgment that (1) the consent form did not bind them to all of the provisions in the ATP rulebook, (2) they did not enter into a contract with the ATP, and (3) the ATP breached its fiduciary duty to them.

The court denied the motion, holding that the players sufficiently alleged that venue was proper in the Southern District of Florida and that the ATP had and breached a fiduciary duty to them and breached that duty.. In assessing whether the venue was proper, the court noted that the ATP was a Delaware corporation and that a substantial part of the events giving rise to the players' claims occurred in the Middle District of Florida. However, the fact that ATP members sponsor two yearly tournaments in the Southern District appeared, —on the surface, —to be sufficient evidence under the state's venue statute. In assessing the breach of fiduciary duty claim, the court concluded that the argument that the ATP was formed to protect the players' interests and intended to educate them about its rules was enough to survive the motion,, especially when the existence of a duty depends heavily on the relationship of the parties and the type of transaction involved.

*Mayer v. Belichick*<sup>43</sup>

The New England Patriots, Patriots's head coach Bill Belichick, and the National Football League moved to dismiss claims brought against them by a

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42. No. 09-61031-Civ-Cohn/Seltzer, 2009 U.S. Dist. LEXIS 87405 (S.D. Fla. Sept. 23, 2009).

43. Civil Action No.: 07-4671 (GEB), 2009 U.S. Dist. LEXIS 23052 (D.N.J. Mar. 23, 2009).

New York Jets's season ticketholder after the Patriots were caught videotaping the Jets' signals and visual coaching instructions during a game. Recording another team's signals is a violation of the league's rules. The court granted the motion, holding that the ticketholder got what he contracted for: a license to enter the stadium and watch the game. The court noted that previous cases had recognized that ticket purchases do not create an obligation to satisfy spectators' subjective expectations about how a game will be played, even if it involves cheating.

*M'Baye v. World Boxing Ass'n*<sup>44</sup>

The World Boxing Association (WBA), a boxing match promoter, and a boxer's attorney moved for summary judgment on claims brought against them by the number one rated contender for the WBA super lightweight title after he was not given the opportunity to fight for the championship within the period of time stipulated by the WBA's rules. The rules provide that a WBA champion must periodically defend his title against the number one rated contender. The rules also and prevent him from signing an agreement to defend the title or actually defending the title against another boxer within sixty days prior to the date he must engage in a mandatory defense. However, champions may avoid the mandatory defense rules by seeking a permit to schedule a non-mandatory fight from the WBA championship committee. The committee may issue a permit if the non-mandatory fight would unify the world titles of various associations or be of great significance to the boxing world. Souleymane M'Baye brought his claims after being denied the opportunity to box for the title on three separate occasions due to the WBA's decision to issue special permits to the super lightweight division champion. On the first two occasions, boxers represented by the defendant match promoter were allowed to fight for the title instead. On the third occasion, the then-champion was represented by the defendant match promoter, and signed an agreement to fight a unification bout within the sixty-day period in which he was supposed to engage in a mandatory defense without first seeking a WBA permit. The WBA championship committee later voted to grant a permit on the same day the request was made. M'Baye sought to enjoin the third fight in state court. After the suit was removed, the attorney for the then-champion claimed his client did not sign the contract to participate in the match until the WBA issued its permit.

The court granted the WBA's motion in part and denied it in part, but

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44. No. 05 Civ. 9581 (DC), 06 Civ. 3439 (DC), 2009 U.S. Dist. LEXIS 69139 (S.D.N.Y. July 29, 2009).



granted the motions of the promoter and the attorney on all of the claims against them. In assessing the WBA's motion, the court first concluded that M'Baye did not have a valid claim under the Muhammad Ali Act because the law only bars associations from arbitrarily changing a boxer's ranking, not from granting exceptions to allow other fighters to box for the title instead. However, the court refused to dismiss M'Baye's breach of contract claim, determining a reasonable jury could find that the WBA was not allowed to issue permits for the latter two fights or that M'Baye's right to box for the title was adversely affected and that his reasonable expectations were not met by being repeatedly bypassed. The court emphasized that there was significant evidence suggesting that the WBA acted in bad faith in interpreting its own rules. In granting the promoter's motion, the court found that the promoter could not be held liable for tortious interference with a contract because there was no evidence to suggest he intentionally and illegally convinced the WBA to breach its own rules and permit other boxers to fight for the title ahead of M'Baye. In granting the attorney's motion, the court also found there was no evidence to suggest tortious interference with a contract, and dismissed the state law claim related to the attorney's misrepresentation about when his boxer signed the contract for the unification bout because M'Baye could not demonstrate he was harmed by the statement. The court emphasized that its decision to deny M'Baye's request to enjoin the fight did not rely on the attorney's representation.

*Montclair United Soccer Club v. Count Me In Corp.*<sup>45</sup>

The CEO of the defendant corporation, Count Me In Corporation (CMI), which provides online registration services for youth sports organizations, moved for summary judgment on claims brought against him by a New Jersey youth soccer organization after the funds owed to the organization were commingled with CMI's own operating funds and CMI failed to pay remittances to the organization when they became due. In the alternative, the CEO also moved for partial summary judgment on the organization's claim for unjust enrichment and for a declaratory judgment that punitive damages were not available on the organization's claim for tortious interference with its contract with CMI. Finally, the organization moved for partial summary judgment on its claims for conversion, unjust enrichment, and deceptive trade practices under state law. Under its client service contract with the organization, CMI was supposed to collect all of the organization's activity registration fees and then remit those payments twice a month, minus agreed-

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45. No. C08-1642-JCC, 2009 U.S. Dist. LEXIS 83535 (W.D. Wash. Sept. 14, 2009).

upon transaction fees. However, CMI failed to remit approximately \$210,000 in fees paid during the spring, summer, and fall of 2008. When organization officials contacted CMI in October 2008, the CEO informed them that the corporation was having cash flow problems, but expected to remit the fees it collected through August within a week. Shortly thereafter, the CEO informed the corporation's employees that clients' funds had been commingled with CMI's own operating funds in order to pay operating expenses. Those expenses were primarily tied to developing a new software technology. CMI eventually forwarded some of the promised fees to the organization, but was still \$117,000 short when this lawsuit was initiated. As part of the lawsuit, the organization also brought claims against CMI and its parent company, but they were stayed after the corporation filed for bankruptcy. The software technology developed by CMI was later sold to a new company, but the CEO was still able to benefit from it because he was a part owner of that entity, deriving a salary of approximately \$180,000 per year.

The court granted the CEO's motions in part and denied them in part, and denied the organization's motion without prejudice. In assessing the CEO's motion for summary judgment, the court held there was a genuine issue of fact as to whether he could be shielded from personal liability by the common law "business judgment" rule. The court emphasized that there were doubts about whether the CMI CEO's management decisions were made in good faith and with the reasonable care, skill, and diligence required to demonstrate proper oversight of CMI's finances, noting that (1) he failed to submit evidence showing that he had discussed the commingling and use of client funds with his advisors; (2) he used client funds for a project that he stood to benefit from; (3) he knew about CMI's remittance problems at least one year prior to disclosing them to clients; and (4) he lied to the plaintiff organization about the reason for the remittance problems. However, in assessing the CEO's alternative motion for partial summary judgment, the court found the organization's claim for unjust enrichment was barred. It emphasized that those claims had to arise out of a valid contract under state law, and that the organization did not have the requisite direct contractual relationship with the CEO. The court also concluded that the organization could not collect punitive damages on its tortious interference claim, noting that those damages were unavailable unless authorized by a state statute. Finally, in assessing the organization's motion, the court noted that the CEO might be held liable for conversion and deceptive trade practices under the common law "responsible corporate officer" doctrine. However, those claims required the court to assess CMI's liability, which it could not do while the bankruptcy stay remained in place.

*Oshinsky v. N.Y. Football Giants, Inc.*<sup>46</sup>

The New York Giants, the New York Jets, and the entities responsible for developing their new football stadium moved to dismiss claims brought against them by a class of the teams' existing season ticketholders after they required those ticketholders to buy personal seat licenses (PSLs) in order to guarantee the right to purchase season tickets to games at the new venue, which is slated to open in the fall of 2010. The ticketholders claimed that the PSL requirement (1) breached their implied option to continue to renew their season tickets, (2) violated New Jersey's Consumer Fraud Act, and (3) violated section one of the Sherman Act. The court granted the motion in part and denied it in part. After assessing the breach of contract claim, the court concluded that the ticketholders had sufficiently alleged that they owned the right to renew their season tickets and that the defendants had breached that right. Relying on other cases that had addressed season ticket renewals, the court determined that it was not inconceivable that implied rights may exist. However, the court found that the class's allegations failed to state a claim under the New Jersey Consumer Fraud Act, emphasizing that there was no evidence that the defendants intended to defraud the class by omitting material terms of the PSLs, even if those terms, when supplied, cause the PSLs that are purchased to drop in value. Finally, the court dismissed the class's antitrust claims, noting that it failed to demonstrate (1) how tying season tickets to PSLs constituted an unreasonable restraint of trade on any market, especially when the defendants already had a monopoly in the New York Metropolitan area, and (2) how the defendants colluded in marketing and selling PSLs, especially when the teams had different purchase prices.

*Provoncha v. Vt. Motocross Ass'n, Inc.*<sup>47</sup>

Motocross athlete Clint Provoncha and his wife appealed a trial court's decision to grant summary judgment to the Vermont Motocross Association (VMA) and the owner of a local racetrack on negligence claims that the Provonchas brought against them after Provoncha suffered injuries when he was struck by another rider while warming up for a race. The collision took place after a race official failed to display a caution flag to warn other riders of the dangerous conditions created when Provoncha fell off his bike. The day before the accident, Provoncha had signed an entry form that purported to exculpate the VMA and the owner of the racetrack from any claims arising out of their negligence in conducting the race-day activities. Provoncha was also

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46. Civil Action No.: 09-cv-1186 (PGS), 2009 U.S. Dist. LEXIS 107608 (D.N.J. Nov. 17, 2009).

47. 974 A.2d 1261 (Vt. 2009).

aware that the VMA used young people as flaggers and that they were often incompetent. However, he ignored any increased risk of injury and continued to race at the track. The Vermont Supreme Court affirmed, holding that the entry form released the VMA and the owner of the racetrack from liability because it was sufficiently clear to put Provoncha on notice of the risks that he assumed and it did not violate public policy. Although the entry form did not specifically include the word “negligence,” the court found it clearly described that the defendants were immune from all types of injury claims in any way connected with the event. In assessing the form’s public policy implications, the court noted the races were not of great importance to the public or open to all persons. In fact, only the 300-plus members of the VMA could participate.

*PTR, Inc. v. Forsythe Racing, Inc.*<sup>48</sup>

Forsythe Racing, Inc. (FRI) and its controlling owner moved to dismiss claims brought against them by Paul Tracy Racing (PTR) after they joined other Champ Car Series owners in selling the organization’s assets to the Indy Racing League, filed for bankruptcy protection, and then refused to pay PTR the termination fee stipulated in their driver services agreement. In the alternative, the defendants moved to strike certain allegations made in PTR’s complaint that referred to contract negotiations between the parties. The court denied both motions. In turning down the motion to dismiss, the court held PTR’s allegations were sufficient to support findings that a second extension of the driver services agreement was executed by the defendants, and that FRI’s controlling owner was acting solely for his own gain when he chose not to pay the termination fee. The court noted that unsigned agreements might be barred by the Illinois Statute of Frauds, but determined that the mere fact that PTR had attached an unsigned copy of the second extension to the complaint did not mean that it had not been signed by the defendants. In turning down the motion to strike, the court noted that the Federal Rules of Evidence prohibit using evidence of settlement negotiations to determine the validity of a claim, but emphasized that the impact of evidentiary rules should be addressed when considering admissibility at trial.

*SB Belkin, LLC v. HTPA Holding Co.*<sup>49</sup>

Steve Belkin, a minority investor in the holding company that owns the National Basketball Association’s (NBA) Atlanta Hawks and the National Hockey League’s (NHL) Atlanta Thrashers, sued the company in the midst of

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48. No. 08 C 5517, 2009 U.S. Dist. LEXIS 48090 (N.D. Ill. June 9, 2009).

49. Civil No. 266748-V, 2009 Md. Cir. Ct. LEXIS 6 (Sept. 10, 2009).

proceedings designed to evaluate the company's value, which would then be used to determine the payment owed to him as part of a buyout agreement. The parties negotiated the agreement (PSA) after it became clear that Belkin could no longer remain an owner due to a dispute with the company's other stakeholders. The dispute centered on Belkin's decision to veto a trade for NBA player Joe Johnson, even though the majority of the other owners approved of the trade. Belkin had the power to reject the deal because the other owners had previously designated him as the Hawks' "Governor", an NBA-mandated position that comes with the sole authority to conduct transactions on behalf of a team. Following the veto, the other owners sought to remove Belkin from that position. Although he was able to obtain an injunction barring that action, it was lifted when NBA Commissioner David Stern submitted an affidavit that approved of his removal. The parties executed the PSA shortly thereafter. According to its terms, anywhere from one to three investment banks would be used to determine the company's value. However, it limited the list of potential appraisers to a small group of firms with experience in mergers and acquisitions of professional sports franchises, and those firms were required to make a neutral evaluation of the company's worth. Belkin had the right to select the first eligible firm. Upon receipt of its appraisal, either party had the right to object within five days by delivering written notice to the other party. If neither party objected, then that appraisal would set the company's value. But if either party objected, the objecting party would then select a second banker to conduct another appraisal. If either party then objected to the second appraisal, the NBA would select a third banker for one final appraisal. If the third appraisal was higher than both of the previous appraisals, the higher of the previous appraisals would establish the company's value. If it was lower than the previous appraisals, then the lower of the previous appraisals would establish the value. Once the price of Belkin's interest was determined, the holding company had sixty days to buy him out, or he would have the option of turning the tables and buying out the other owners.

Upon Belkin's selection of the first appraiser, both parties made their best efforts to cloud its judgment, making it difficult for the firm to remain neutral. In addition, both parties vigorously tried to determine the exact time that the appraisal would be communicated. That legleg work paid off for Belkin. Just one minute after receiving the report, he formally objected to it, reasoning that by being able to select the first two banks, the first two appraisals were likely to be high, thereby mitigating the impact of a third evaluation. However, a short time later, the company also objected, notifying Belkin of the firm that it had selected as the second banker. That same day, Belkin filed suit, claiming he was allowed to select the second banker under the terms of the PSA. While

his claim was pending, he notified the company that he was hiring another banker to conduct the second appraisal. That appraisal ultimately valued the company at a price more than ten percent higher than the first appraisal. The company responded by notifying Belkin that it would not recognize the second report as a valid appraisal under the PSA. The trial court concluded that there was no ambiguity in that agreement the PSA and that Belkin, as the first party to object, was allowed to select the second banker. Subsequently, Belkin obtained a summary judgment that the holding company had breached the PSA by either failing to jointly engage a third banker or failing to buy out his interest. An appellate court reversed, holding the terms of the PSA were ambiguous as to how the parties were to proceed if both parties objected to an appraisal. It remanded to the trial court to determine the intent of the parties in drafting those terms.

After examining the surrounding circumstances and all available extrinsic evidence, the court held that the PSA was void and unenforceable because the parties did not come to a meeting of the minds on how to proceed if both parties validly objected to an appraisal. The court concluded that the individuals who negotiated the PSA never discussed the possibility of both parties objecting to the same appraisal, emphasizing the lack of provisions governing how appraisals were to be communicated or how a party could object to them. In fact, there was nothing in the negotiations between the parties that suggested a race to object would determine the second appraiser. The court also refused to interpret any post-contract actions in assessing whether it should supply missing terms. It emphasized that both parties sought to influence the outcome of the appraisal process, which made the right to select future bankers a material issue. Because the conditions precedent to determining the buyout price had not been satisfied, the court left the parties to figure out how to proceed with the sale of Belkin's interest.

*Southshore Baseball, LLC v. Aramark Sports & Entm't Servs., LLC*<sup>50</sup>

The entity that runs the Gary Southshore Railcats minor league baseball team (Southshore) moved for summary judgment on a petition for declaratory relief that would allow it to unilaterally terminate its concession services agreement with Aramark Sports and Entertainment Services, LLC (ASES) in exchange for a stipulated termination payment. Southshore made its decision to terminate the contract just one day after the start of a new season. The court denied the motion, holding that the language of the agreement could not be construed to show that the parties intended that Southshore could terminate it

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50. Civil Action No. 2:08-CV-313 JVB, 2009 U.S. Dist. LEXIS 17561 (N.D. Ind. Mar. 6, 2009).

for any reason solely in exchange for a termination payment. The court found that two provisions in the contract provided termination rights, but that Southshore was relying on a third provision to terminate the agreement.. That provision limited ASES's remedies to a termination payment only if Southshore terminated the agreement for cause under one of the other two provisions. The court also emphasized that ASES would not have given Southshore the right to immediately terminate the agreement without cause in the midst of a season while simultaneously retaining the right to receive notice and the opportunity to cure had it actually been in breach.

*Team Gordon, Inc. v. Fruit of the Loom, Inc.*<sup>51</sup>

The NASCAR team owned by driver Robby Gordon and Fruit of the Loom, Inc. (FOL) filed cross-motions for summary judgment on claims and counter-claims asserted in a lawsuit brought by the team after FOL chose to sever their three-year sponsorship agreement with one year remaining. The agreement was the product of a plan hatched by the team's CEO and motorsports marketer, Larry Camp, in order to find a sponsor. Camp contacted Speedway Motorsports (SMI), a NASCAR-apparel distributor, which was seeking to enter into an exclusive arrangement with an apparel manufacturer, provided that the manufacturer also sponsored a NASCAR team. Subsequently, Camp contacted FOL about becoming a team sponsor and SMI's exclusive apparel provider. In the summer of 2003, Camp entered into a confidential agreement with Gordon's team. The agreement stipulated that if Camp helped the team secure the FOL sponsorship, the team would pay him a percentage of the fees received during the first three years of the deal. Two weeks later, Camp entered into a separate commission arrangement with FOL, guaranteeing him approximately \$700,000 over three years in exchange for helping to develop FOL's motorsports marketing program. That deal also required him to negotiate the terms of its sponsorship of Gordon's team on the company's behalf. In early fall, FOL entered into an agreement to sponsor Gordon's team in the Busch Series. Although the agreement stipulated that it could last up to three years, FOL was given the opportunity to evaluate the deal each year and could decline to extend it to subsequent seasons if the entire program failed to substantially meet its reasonable expectations. Another provision in the contract required Gordon's team to return \$50,000 every time that it failed to qualify for a race that FOL sponsored. Finally, the agreement included a "morals" clause that would allow FOL to terminate the sponsorship if the team's conduct reflected unfavorably upon the company.

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51. No. 3:06-cv-201-RJC, 2009 U.S. Dist. LEXIS 169171691716197 (W.D.N.C. Feb. 19, 2009).

Following the first season under the agreement, Gordon's team chose to move up to the Nextel Cup Series. As a result, the parties transformed their twenty-four-race sponsorship into a ten-race sponsorship. However, Gordon's team struggled the following season, failing to qualify for seven races and finishing thirty-seventh in the points standings. Although the sponsorship agreement was never amended, FOL sought to increase the \$50,000 non-qualifying penalty into the standard \$150,000 penalty used at the Nextel Cup level. But it took months of negotiating before Gordon's team agreed to pay the standard refund for failing to qualify for a race in early 2005. During that time, FOL informed the team that it would not renew its sponsorship for the final year of the deal. The parties were still negotiating the refund penalty in September when the FOL declined to make a required payment under the sponsorship agreement. FOL sought to split up the payment to ensure that Gordon's team qualified for the four remaining FOL-sponsored races. Later that month, Gordon wrecked his car in a collision with Michael Waltrip at a race in New Hampshire. Gordon became so incensed that he threw his helmet at Waltrip's car and called him a curse word on live national television. Subsequently, NASCAR fined Gordon's team and placed Gordon on probation for the remainder of the season. The next day, FOL informed the team that it was terminating its sponsorship immediately under the "morals" clause in their agreement.

The court granted the team's motion in part, but denied FOL's motion on all of its counterclaims. In assessing the team's motion on its 2005 breach of contract claim, the court concluded that FOL's failure to make its required payment under the sponsorship arrangement was a material breach, even though the team's subsequent breach of the "morals" clause discharged FOL's later payment obligations. However, the court refused to award the team the requested \$600,000 in damages at the summary judgment stage because there was a genuine issue as to whether the team's mitigation efforts were reasonable. The court also granted the team's motion on FOL's breach of contract counterclaim related to the 2005 season because the contract did not guarantee that FOL would be entitled to a refund of part of its sponsorship fees when it unilaterally terminated the agreement under the "morals" clause. In denying FOL's motion on the team's 2005 breach of contract claim, the court found there was a genuine issue as to whether FOL's NASCAR program failed to substantially meet its reasonable expectations under the sponsorship agreement, which was required before FOL could choose not to renew the deal. Finally, the court granted the team's motion—and denied FOL's motion—on the company's state law claim for unfair and deceptive trade practices, which was based on the team's undisclosed confidential relationship with Camp. The court noted that Camp did not have the authority to enter into the



sponsorship agreement on FOL's behalf, and did not have any fiduciary relationship with FOL at the time he entered into his arrangement with the team. It also emphasized that Camp had touted two other NASCAR teams over Gordon's team during the sponsorship negotiations, indicating that he did not give Gordon's team an una fair advantage.

*Wolff v. Zip.ca, Inc.*<sup>52</sup>

*Canadian Am. Ass'n of Prof'l Baseball, Ltd. v. Ottawa Rapidz*<sup>53</sup>

In companion cases, the court assessed motions in lawsuits involving parties associated with the Canadian American Association of Professional Baseball (CAAPB). In the first case, Canadian corporation Zip.ca moved to dismiss a breach of contract claim brought against it by the owner of Ottawa Professional Baseball, Inc. (OPBI) on jurisdictional grounds. The owner was also the commissioner of the CAAPB, which was based in North Carolina. OPBI had leased the right to field a CAAPB team in Ottawa, and the owner entered into an agreement that gave Zip.ca the right to manage that membership. In exchange, Zip.ca was required to indemnify the owner for up to \$216,000 in costs that he might accrue in satisfying a personal guarantee that he had made to the Canadian city. The cause of action arose when Zip.ca failed to reimburse him for the cost of the annual rent to use the city-owned baseball stadium. However, the court granted the motion, holding that the doctrine of *forum non conveniens* required the dispute to be heard in Ottawa. It found the public interests strongly favored the alternative forum because (1) the indemnity clause in the agreement applied to costs that the plaintiff might accrue as the owner of a league membership, not as the league commissioner; (2) all the events leading up to the dispute took place in Ottawa; and (3) Zip.ca had a lawsuit pending against the plaintiff in an Ontario court. More importantly, the agreement stipulated that Canadian law would govern its terms and that both parties would submit to jurisdiction in an Ottawa court with respect to any matter arising out of it.

In the second case, the CAAPB and the OPBI moved to remand the CAAPB's petition to confirm an arbitration award that denied the Ottawa Rapidz's request to voluntarily withdraw from the league for financial reasons and found that the club had violated its affiliation agreement by failing to field a team in 2009. The violation automatically terminated the club's membership in the league, and, more importantly, allowed the league to draw upon its letter of credit. The OPBI was a named defendant in the petition, but had not

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52. No. 1:09CV92,2009 U.S. Dist. LEXIS 48570 (M.D.N.C. June 10, 2009).

53. No. 1:09CV93, 2009 U.S. Dist. LEXIS 49410 (M.D.N.C. June 11, 2009).

consented to removal. The club and its individual directors claimed that the OPBI was fraudulently joined in order to prevent the court from asserting diversity jurisdiction. They argued that the interests of the CAAPB and the OPBI were not adverse because the owner of the OPBI was also the league's commissioner, and that subject to realignment the court could assert jurisdiction. The OPBI claimed it was adverse because the result of the arbitration cost the organization its leased membership rights in the league. The court granted the motion, holding that the defendants had failed to demonstrate that the OPBI was fraudulently joined or that one of the exceptions to complete diversity applied. Contrary to the defendants' arguments, the court found that the CAAPB was able to assert a cause of action against the OPBI because that organization retained a property interest in the club. Although it had previously sold its management rights to Zip.ca, which effectively owned the club, the OPBI still controlled the lease on the league membership, and the club knew that fact when it volunteered the letter of credit. Only by terminating the lease was the CAAPB able to draw upon it.

#### COURT OF ARBITRATION FOR SPORT

The Court of Arbitration for Sports (CAS) was established by the International Olympic Committee in 1984 as an independent alternative forum for resolving international sports disputes. The CAS is based in Switzerland and its procedural are governed by statutes enacted by the International Council of Arbitration for Sport. The CAS applies the substantive law chosen by the parties that have agreed to submit to its jurisdiction. Those parties include every national or international governing body that is a member of the Olympic Movement. The CAS is limited to adjudicating commercial, civil liability, and disciplinary disputes; however, its decisions have created a unique body of law known as *lex sportiva*. The following materials show illustrate that the majority of cases that the CAS tackles involve player-team contract disputes and doping-related sanctions.

#### *Al-Hilal Al-Saudi Club v. FIFA*<sup>54</sup>

Saudi Arabian soccer club Al-Hilal Al-Saudi appealed the date when a suspension imposed on Libyan soccer player Tareq Eltaib by the FIFA Dispute Resolution Chamber (DRC) could take effect. Eltaib entered into a contract to play for Al-Hilal Al-Saudi in July 2006, after a previous CAS panel stayed the execution of a DRC decision that found him in breach of his employment agreement with another team in Turkey. The CAS panel eventually upheld the

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54. CAS 2008/A/1674.

decision and remanded the matter back to the DRC to determine the compensation owed to Eltaib's former club and whether any sporting sanctions should be handed down against the player or Al-Hilal Al-Saudi. In November 2007, the DRC decided to suspend Eltaib for four months. Al-Hilal Al-Saudi argued the suspension should not take effect in September 2008, which marked the beginning of the Saudi Arabian Football Association (SAFA) soccer season, because the club was not notified of the DRC's decision until November and FIFA rules prevented sporting sanctions from taking effect until the start of the following season. The CAS panel held the suspension could not take effect until the beginning of the next soccer season in the SAFA or any another league in which Eltaib might play. It determined Al-Hilal Al-Saudi's interpretation of FIFA rules was correct and had to be considered in conjunction with the delayed communication of the DRC's decision. The DRC decision stated that the sanctions would not take effect until the decision was communicated, so the rules could only be applied when Al-Hilal Al-Saudi received the news of Eltaib's suspension.

*Anderson v. Int'l Olympic Comm.*<sup>55</sup>

Members of the 2000 U.S. Olympic Track and Field team appealed the International Olympic Committee's (IOC) decision to strip them of the medals that they won while participating on relay teams with former world-record-holding sprinter Marion Jones, who later admitted that she was doping during the Games. Rule 25.2.2.4 of the 2000 Olympic Charter provided, that "no decision taken in the context of the Olympic Games [could] be challenged after a period of three years from the day of the closing ceremony of such Games." The CAS panel upheld the IOC's ruling, concluding that the decision to award the athletes medals in the 2000 Olympic Games was not a decision by the IOC "taken in the context of the Olympic Games." Instead, the CAS panel held that the individual international federations made the decision as a consequence of determining the results of the competition. The panel emphasized that the IOC was merely adhering to the rankings and results from the international federations. As a result, the three-year rule did not prevent it from requiring the athletes to return their Olympic medals under the provision of the 2000 Olympic Charter.

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55. CAS 2009/A/1545.

*Deutsche Reiterliche Vereinigung e.V. v. FEI*<sup>56</sup>  
*Ahlmann v. FEI*<sup>57</sup>

In combined cases, both the national governing body for equestrian sports in Germany and German show-jumping rider Christian Ahlmann appealed the International Equestrian Federation (FEI) Tribunal's decision to suspend Ahlman for four months after finding that he broke medication control rules but did not commit an anti-doping violation when he used an ointment containing a hyper-sensitizing agent on his horse prior to an event in the 2008 Olympics. Ahlmann had previously competed on the German team in the 2004 Olympics, when it won gold. However, the athletes' medals were revoked after another rider tested positive for a banned substance. During the 2008 Games, Ahlmann filled out forms to receive authorization to use medication on his horse but failed to mention that he was treating the animal with the hyper-sensitizing agent. Following the Team Jumping Final, the horse was given a doping test and the results confirmed the agent's presence. The FEI Tribunal concluded that the agent could qualify as both an illegal doping substance and a banned medication under the national governing body's rules. However, it held that the international federation had to prove a horse's legs were actually hyper-sensitized to find an athlete guilty of a doping violation. Because that fact was not proven, the FEI Tribunal determined that Ahlmann only breached the medication rules.

The CAS panel reversed, concluding that Ahlmann violated the national governing body's anti-doping rules and should be suspended from competition for eight months. The panel determined that the rules created a system in which the mere presence of a banned substance constituted an infraction. In assessing the appropriate sanction, the panel emphasized that, under most circumstances, Ahlmann could have been suspended for up to two years, and that he should have exerted more care under the circumstances, especially after having his medal revoked at the previous Olympics. However, the panel could only suspend him for an additional four months because the CAS was prohibited from imposing a larger penalty than the one requested.

*FC Midtjylland A/S v. FIFA*<sup>58</sup>

Danish soccer club Midtjylland A/S appealed the FIFA Players Status Committee's decision to reprimand it for violating a FIFA rule by systematically transferring minor players to Denmark under an agreement with

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56. CAS 2008/A/1700.

57. CAS 2008/A/1710.

58. CAS 2008/A/1485.

a Nigerian club. The agreement gave Midtjylland A/S a purchase option on some of the Nigerian club's best talent and allowed it to enroll players under the age of eighteen in its soccer academy. Midtjylland A/S registered six minor players from the Nigerian club as amateurs under the definition provided by the Danish Football Association (DFA), the national governing body for soccer in Denmark. The players were also granted residence permits, but they did not include the right to work. FIFA charged Midtjylland A/S with violating its rule prohibiting the international transfer of minor players, and the Players Status Committee eventually found the club guilty. Midtjylland A/S argued that the rule did not apply to the players at issue. In the alternative, it claimed that the players were workers under European Union (EU) law and that FIFA violated that law by discriminating against Nigerian citizens living legally in Denmark.

The CAS panel upheld the decision, determining that the FIFA rule applied to the amateur players and that none of its listed exceptions could be used in this case. Although FIFA had previously allowed international transfers when the players could establish that they were attempting to further their education, the evidence here indicated that the main reason for the transfers was to help Midtjylland A/S find the next soccer star. The panel also concluded that EU law was not binding on the CAS because the arbitration agreement provided that the FIFA Statutes would govern the dispute. But even if the CAS had to apply EU law, the panel found that the FIFA rule was perfectly legal. It emphasized that the EU's agreement with Nigeria protects citizens against discrimination in working conditions, not actual access to employment, and that the players in this case were not employed.

*FC Shakhtar Donetsk v. Francelino da Silva*<sup>59</sup>  
*Francelino da Silva v. FC Shakhtar Donetsk*<sup>60</sup>

In combined cases, both Ukrainian soccer club Shakhtar Donetsk and Brazilian soccer player Matuzalem Francelino da Silva appealed the FIFA Dispute Resolution Chamber's (DRC) decision that ordered Francelino da Silva to pay Shakhtar Donetsk €6.8 million for breaching their employment contract. Shakhtar Donetsk acquired Francelino da Silva from an Italian club in June 2004, for €8 million. In addition to the transfer fee, it paid €3.75 million in agent fees and over €221,000 to two Brazilian clubs to comply with the solidarity mechanism. Later that month, the club signed the player to a five-year, €8 million contract, which included a clause that required Shakhtar

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59. CAS 2008/A/1519.

60. CAS 2008/A/1520.

Donetsk to transfer Francelino da Silva to another team if it received an offer of at least €25 million. The contract was slightly amended on several occasions prior to July 2007, when another Italian club offered Shakhtar Donetsk €7 million for Francelino da Silva. Shakhtar Donetsk turned down the offer, and a few days later Francelino da Silva informed the club that he was unilaterally terminating his employment contract under FIFA rules. The club responded by informing him that it would initiate disciplinary sanctions if he signed with another club unless he paid a buyout of €25 million, which was allegedly stipulated in the contract. A few weeks later, Francelino da Silva signed a contract with the Spanish club Real Zaragoza, which subsequently loaned him to another Italian club, SS Lazio, after Shakhtar Donetsk brought its claim. The loan was free, but SS Lazio had an option to pay a €13 million or €15 million fee to make the transfer permanent, depending on whether Real Zaragoza was found jointly and severally liable for Francelino da Silva's breach of his employment agreement with Shakhtar Donetsk. The DRC concluded that Real Zaragoza was liable, but not for the amount requested. It held the contractual provision that required Shakhtar Donetsk to transfer Francelino da Silva if it received an offer of at least €25 million could not also be interpreted as a buyout clause. However, the DRC still ordered Francelino da Silva and Real Zaragoza to pay €6.8 million in compensation for his breach.

The CAS panel modified the penalty imposed by the DRC, raising the amount of compensation owed to more than €11.8 million. The panel made its calculation after considering a series of factors listed in the FIFA rules, which did not allow it to consider the transfer offer made to Shakhtar Donetsk just prior to Francelino da Silva's breach. The panel concluded Francelino da Silva's services were worth just over €11.2 million over the final two years of his contract. The total was the average sum of his worth to Real Zaragoza and SS Lazio over the two-year period, taking into account his salary and the option clause in their loan contract, minus the remaining amount on his employment contract with Shakhtar Donetsk. The total did not take into account the non-amortized transfer fee paid by Shakhtar Donetsk to acquire Francelino da Silva, which was incorporated into the value of the player's services to Real Zaragoza and SS Lazio, or any other transfer payments, which were a cost of doing business. Although it had the option, the panel also decided not to attach any liability for Shakhtar Donetsk's cost of acquiring a replacement player. However, it did hand out a sporting sanction of €600,000, penalizing Francelino da Silva for breaching the contract (1) with two years remaining; (2) just after receiving an increase in his salary; (3) without previously indicating he wished to look for other opportunities; and (4) just before Shakhtar Donetsk began the qualifying rounds for the UEFA

Champions League.

*Federazione Italiana Giuoco CalcioFIGC v. World Anti-Doping Agency*<sup>61</sup>

The national governing body for soccer in Italy appealed a previous CAS award that imposed a one-year suspension on Italian soccer players Daniele Mannini and Davide Possanzini for violating the Italian Olympic Committee's anti-doping rules, claiming that new evidence had become available and if the previous CAS panel had known this evidence, its decision would have been different. Both Mannini and Possanzini were selected to take a drug test following a soccer match involving their team, Brescia, in "Serie B." But before the players were able to report to the anti-doping control station, the team's coach and president ordered them into the locker room for an important meeting. The anti-doping control officer was invited to join them, but the door was blocked from the inside. The meeting lasted between ten and twenty-five minutes, after which the players proceeded to the control station and provided samples. Both tests were negative. Taking into account the provisions of the operating instructions of the Olympic committee's anti-doping commission and the WADA International Standard for Testing, the previous CAS panel determined that athletes may violate the committee's anti-doping rules if they do not promptly report to the control station and fail to remain within sight of their chaperone during a delay. It noted any other interpretation of the rules would give athletes an easy excuse to show up late and ample time to cheat. The panel concluded Mannini and Possanzini violated the rules because the control officer did not agree to allow them to attend the team meeting without supervision. It also concluded that the players' dilemma did not constitute a compelling justification for the delay, even though it would have been illegal to punish the players for skipping the team meeting to comply with the rules.

The new CAS panel vacated the previous award, re-confirming the decision of the Olympic committee's appeals panel that held only that the national governing body erred in determining Mannini and Possanzini could not be sanctioned for violating the operating instructions of the anti-doping commission and imposed a fifteen-day suspension on the players. First, the panel determined the conditions for revising the previous award were met because the evidence was produced to show there was a lack of understanding and confusion about the requirement that players immediately proceed to the anti-doping control station while being continuously chaperoned. The panel found that evidence could have an impact on the outcome of the case because whether the anti-doping control procedures that the previous panel deemed

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61. CAS 2008/A/1557, *vacated*, CAS 2008/A/1557.

applicable were properly applied and understood at the time of the test was relevant to whether an anti-doping violation occurred. Applying the test of diligence, the panel also found that the players were unable to produce that evidence in the previous proceedings without any negligence on their part. It emphasized that the players were not aware that the Olympic committee's anti-doping commission was interpreting the in-competition testing procedures as "advance notice" tests that did not require chaperoning until after the previous award had been published. Further investigation stemming from that discovery also revealed that, as a general matter, Italian soccer players were not aware of their relevant obligations during the anti-doping control process and anti-doping control officers had previously tolerated delays in testing and non-continuous chaperoning. Applying the anti-doping rules to a broader set of facts, the panel concluded that it should modify of the previous award. It noted that neither of the players clearly understood whether they were being subject to an in-competition "advance notice" test or an out-of-competition test, or whether they had a duty to proceed to the doping control station and stay in contact with the chaperones at all times. The panel also emphasized that the players could not be held responsible for their lack of knowledge because the anti-doping control procedures were combined in the operating instructions of the anti-doping commission and the WADA International Standard for Testing in a manner that was not easy to comprehend and the players were not educated about those rules by the national governing body or their union.

*Hoch v. FIS*<sup>62</sup>

Cross-country skiing coach Emil Hoch appealed the International Ski Federation (FIS) Doping Panel's decision to declare him ineligible to participate in any FIS-sanctioned event for life for helping Austrian athletes commit anti-doping violations during the 2006 Olympics. Hoch was the coach of the Austrian team at those Olympics and stayed at a private apartment situated a short distance from the athletes' quarters in Italy. In the middle of the festivities, the Italian police raided both locations and seized a variety of items used to commit blood doping. The police found some of those items were found in a bag in Hoch's room and found others in a dustbin at the entrance to the apartment. Hoch admitted collecting the items found in his bag from the athletes' quarters in order to dispose of them. Immediately following the raid, Hoch drove home to Austria. The FIS instituted disciplinary proceedings, bringing charges against the athletes and the team's support

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62. CAS 2008/A/1513.



personnel, including Hoch. The FIS Doping Panel convicted Hoch of violating two different anti-doping rules, including one that prohibited assisting others commit or cover up anti-doping violations. Because those conspiracies are considered far more serious than individual violations, they carry the possibility of a lifetime ban.

The CAS panel partially upheld the decision, concluding that Hoch participated in a doping conspiracy but that his the ban should be reduced to fifteen years, which was roughly two-thirds of the number of years that he had remaining before retirement. After noting that Hoch could only be charged with one anti-doping violation under FIS rules, the panel determined that he knew about the athletes' doping practices and acted with the intent to cover them up. It noted that some of the medical items found in his bag could not be used for permitted purposes and that he had failed to explain how the other items were needed under the circumstances. The presence of similar medical items in the dustbin and Hoch's rush to return to Austria following the police raid were other facts to support that conclusion. However, the panel reduced his penalty after determining a lifetime ban would violate the principle of proportionality, especially when there were doubts about his role in the conspiracy. The panel noted that the Austrian team had a history of doping issues prior to his arrival as coach, which suggested other high-ranked officials might have been involved.<sup>t</sup>

*Int'l Ass'n of Athletics Federations v. Real Federacion Espanola de Atletismo*<sup>63</sup> RFEA<sup>64</sup>

In consolidated appeals, the IAAF sought to overturn decisions of the national governing body for track and field in Spain that Spanish hurdler Josephine Onyia did not commit anti-doping violations when she tested positive for an allegedly prohibited substance following a third-place finish in a race in Switzerland and for a different, undisputedly prohibited substance following a first-place finish in a race in Germany eleven days later. The drug test that took place in Switzerland revealed the presence of an analogue of a banned stimulant; however, the WADA-accredited laboratory that conducted the test was unable to report its finding to the IAAF until after Onyia had participated in the second event in Germany. The drug test that took place in Germany revealed the presence of a negligible amount of clenbuterol, a steroid that is expressly included on the WADA Prohibited Substances List. Onyia requested her "B" samples be opened, but testing only confirmed the presence

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63. CAS 2009/A/1805; CAS 2009/A/1847.

64. CAS 2009/A/1847; CAS 2009/A/1805.

of the prohibited substances in both cases. Under IAAF rules, both adverse findings were brought in front of the national governing body's disciplinary committee; however, the committee refused to sanction the athlete. After assessing the Swiss finding, the committee concluded that the substance detected could not be considered a banned substance under the Prohibited List. More importantly, it found that Onyia could not be suspended even if the substance was banned. The committee emphasized that the drug would have to be classified as one of the Prohibited List's "Specified Substances," and that Onyia satisfied her burden of establishing that the use of the substance was not intended to enhance her performance. After assessing the German finding, the committee concluded that the banned substance was not detected at the level required by the WADA technical documents and that its presence could have been caused by Onyia's ingestion of contaminated meat.

The CAS panel reversed, holding that Onyia committed a single anti-doping violation when she tested positive for both substances and was therefore suspended from competition for two years. In assessing the Swiss finding, the panel emphasized that the substance detected did not have to be expressly included on the Prohibited List to be illegal, and found that it was analogous to a listed substance because it had a similar chemical structure and related biological effects. The panel noted that the substance detected could not be considered a "Specified Substance" merely because it was analogous to a substance that was; however, it determined that Onyia would not be entitled to a reduced sanction in any event because she failed to establish how the substance entered her body. In assessing the German finding, the panel emphasized that the presence of clenbuterol at any level would result in an adverse finding, and that the national governing body had misinterpreted the WADA technical documents. It noted that the documents only established the minimum levels of substances that laboratories would have to detect to maintain their accreditation, and that the German laboratory had detected clenbuterol at an even lower concentration than was required. Finally, the panel found that Onyia could not argue that exceptional circumstances mandated a reduced sanction because there was no evidence to suggest the banned substance entered her body through contaminated meat.

*Int'l Ass'n of Athletics Federations v. Athletic Fed'n of Slovn.*<sup>65</sup>

Slovenian long-distance runner Helena Javornik tested positive for a substance banned under IAAF rules. However, the anti-doping commission of the national governing body for track and field in Slovenia concluded that she

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65. CAS 2008/A/1608.

did not violate any anti-doping rules because her test results did not meet the criteria required by a WADA technical document to declare them valid. The commission also emphasized that the antibodies used to detect the substance were not meant to be used in diagnostic testing. The CAS panel reversed, determining that Javornik committed an anti-doping violation and should be suspended from competition for two years. It emphasized that the test results met the necessary criteria to make a valid finding under the “direct detection” method, and the antibodies used were the type required under the WADA technical document. The panel also concluded that the testing procedures did not materially deviate from the IAAF guidelines or the WADA standards, and the condition in which Javornik’s sample was stored could not have tainted the results in the manner that she claimed.

*Int’l Tennis Fed’n v. Gasquet*<sup>66</sup>  
*World Anti-Doping Agency v. Gasquet*<sup>67</sup>

In consolidated appeals, the International Tennis Federation (ITF) and WADA appealed the ITF Tribunal’s decision to suspend professional tennis player Richard Gasquet for only two-and-a-half months after he violated ITF anti-doping rules by testing positive for a trace amount of cocaine. Gasquet sought to uphold the ITF Tribunal’s decision, claiming that the positive test was the result of spending the night prior to his drug test at various nightclubs in France and kissing a woman who had been a habitual cocaine user. The CAS panel upheld the ITF Tribunal’s decision, relying on the “balancing the probabilities” test to conclude that the only logical explanation for the drug in Gasquet’s system was his interaction with the cocaine user. This finding ruled out the possibility that one of his drinks had been spiked and an assessment of whether he bore significant fault or negligence for letting the drinks out of his sight. Instead, the panel concluded that he bore no fault or negligence because he did not suspect, nor could he have known with the utmost caution, that he had ingested the drug. However, the panel had to uphold the ITF Tribunal’s conclusion that Gasquet bore no *significant* fault or negligence because he had challenged only the ITF’s appeal, not the original decision to suspend him for two-and-a-half months.

*Kurten v. FEI*<sup>68</sup>

Show-jumping rider Jessica Kurten appealed the International Equestrian

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66. CAS 2009/A/1926.

67. CAS 2009/A/1930.

68. CAS 2008/A/1569.

Federation (FEI) Tribunal's decision to suspend her from competition for two months after finding that she broke medication control rules when her horse tested positive for an anti-inflammatory drug following an event in France. Following the analysis of the "A" sample, Kurten requested that the FEI conduct an the "B" analysis of the "B" sample in the presence of her appointed witness at a different WADA-accredited European laboratory. When informed that not all of the WADA laboratories test equine samples and that the other three FEI-approved laboratories were located outside Europe, she chose to have the sample analyzed in the U.S. However, the U.S. laboratory notified the FEI that it was not yet prepared to carry out the type of analysis requested. Therefore, the analysis took place at the same French lab that examined the "A" sample. Kurten's appointed witness was not allowed to view the actual analysis of the sample because he did not satisfy the requirements promulgated by the FEI under the WADA Code. The analysis confirmed the presence of the anti-inflammatory drug, but rather than accept administrative sanctions that did not include a suspension, Kurten appealed.

The CAS panel upheld the decision, concluding that a two-month suspension was not disproportionate when compared to the offense. It noted that the WADA Code partially delegated the implementation of the rules for horse doping to international federations like the FEI. As a result, the FEI could not only require both sample analyses to take place at FEI-accredited laboratories, it could also insist that both analyses takes place at the exact same laboratory. The panel also determined that the FEI had a good reason for not allowing the U.S. laboratory to conduct the analysis of the "B" sample and found no problem with the test method or validation procedures used by the French lab. Finally, it held Kurten's right to be heard was not violated because she had plenty of time to find another expert that was qualified to observe the whole analysis of the "B" sample and she did not have a convincing reason for refusing to sign a confidentiality agreement that was required to gain access to her requested documents. The panel found that the sanction was appropriate because the FEI rules stipulate that she could have been suspended for up to one year and she was unable to establish any basis for reducing or eliminating that penalty.

*Montcourt v. Ass'n of Tennis Professionals*<sup>69</sup>

Now-deceased French tennis player Mathieu Montcourt appealed an ATP Tour hearing officer's decision to fine and suspend him for gambling on the sport. The tour's rules prohibit players that compete in any ATP event from

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69. CAS 2008/A/1630.

wagering on the outcome of any tennis match, amateur or professional. Those rules are found in the ATP Official Rules Book, and Montcourt signed a document agreeing to be bound by them in both February 2003, and February 2005. But between June 2005, and September 2005, he bet on several matches through an online organization. The CAS panel upheld the fine, but reduced the length of the suspension by three weeks. It emphasized that Montcourt had been *de facto* suspended for one week prior to the appeal, which forced him to miss a tournament and the French Tennis Federation to award a wildcard spot at the U.S. Open to another player. Accordingly, the panel gave that week triple weight. In addition, it delayed the imposition of the suspension until July because Montcourt was ready to have his appeal heard in 2008, and it would not be just for organizational delays to cause him to miss Grand Slam events.

*Mutu v. Chelsea Football Club Ltd.*<sup>70</sup>

Romanian soccer player Adrian Mutu appealed a decision of the FIFA Dispute Resolution Chamber (DRC) that ordered him to pay English Premier League soccer club Chelsea over €17 million as compensation for breaching his employment contract without just cause during the protected period when he tested positive for cocaine in October 2004. Chelsea acquired Mutu from an Italian club under a transfer agreement in August 2003, for €22.5 million Euros. Subsequently, Mutu and the club entered into an employment contract running from August 2003, until the end of June 2008. The contract included a signing bonus of €330,000, to be paid in five installments, of which two were made prior to Mutu's breach. Chelsea also agreed to pay Mutu's agent €500,000, also to be paid in five installments, of which two were made prior to the breach. One week following the positive drug test, Chelsea terminated Mutu's contract. Shortly afterwards, the English Football Association, the national governing body for soccer in England, suspended him for seven months. FIFA adopted the sanction in order to give it worldwide effect. Chelsea sought damages from the DRC for the wasted costs of acquiring Mutu, the cost of replacing him, the unearned portion of his signing bonus, and various other benefits that he had received. Applying Article 22 of the FIFA Regulations for the Status and Transfer of Players, the DRC assessed the objective criteria listed, and concluded that the unamortized cost of the transfer payment, the unamortized amount of the signing bonus, and the unamortized amount of the full agent's fee should be added together to determine the appropriate amount of compensation owed. Although it also

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70. CAS 2008/A/1644.

could have considered the remaining value of Mutu's employment contract, the DRC declined to add it to the amount of compensation owed because Chelsea had immediately terminated his contract. The DRC also declined to impose a sporting sanction based on the specificity of the sport, noting that Chelsea's final compensation request did not incorporate such an award. It calculated the amount of compensation owed at just less than €17.2 million.

The CAS panel upheld the DRC's determination of the total amount of compensation owed, but its calculations differed in a material manner. First, the panel determined that applying the criteria listed in Article 22 was consistent with English law, which also governed the dispute pursuant to the employment contract. It noted that English law allows compensation for costs incurred by clubs that reasonably rely on a promised performance, but end up wasted when a breach occurs. The panel pointed out that the loss incurred was not remote because it was within the reasonable contemplation of both parties when the contract was executed. It also found that Chelsea's claim was not precluded by its choice to terminate the contract because English law does not limit an innocent party's choice of remedies following the other party's breach, and the duty to mitigate damages only arises after a decision is made. Finally, the panel emphasized that the criteria listed in Article 22 was not contrary to European Community law, and even if it was, Mutu would still be liable for damages under English law. It determined that applying the criteria could not constitute a discriminatory measure based on nationality because the FIFA Regulations do not consider the nationality of a player involved as a triggering element, and could not constitute an anti-competitive practice because large compensation payments are directly proportional to the amount of damage caused. The panel also noted that large payments do not prevent players from exercising their freedom of movement. In calculating the amount of compensation owed, the panel affirmed that the unamortized cost of the transfer fee, the unamortized amount of the signing bonus, and the unamortized amount of the agent's fee were appropriate criteria to consider. However, it calculated the amounts due under each of those criteria differently than the DRC. First, it noted that the contract only covered fifty-eight-and-a-half months, not the full five-year period applied by the DRC. Thus, all of the unamortized amounts used had to be increased/raised accordingly. However, the panel also recognized that when an installment method is provided, only the unamortized amount of the payments actually made can be used to determine the compensation owed. As a result, Mutu's liability on the signing bonus and agent's fee would actually be reduced. But the panel also found that the DRC failed to consider other unamortized acquisition costs, such as portions of the club's solidarity contribution, transfer levy, and fees to its own agents. Therefore, it concluded that it could still grant the relief requested by

the club: the full amount of compensation already awarded by the DRC.

*Neth. Antilles Olympic Comm. v. Int'l Ass'n of Athletics Federations*<sup>71</sup>

The Netherlands Antilles Olympic Committee (NAOC) challenged an IAAF Jury of Appeal's decision that Netherlands Antilles sprinter Churandy Martina committed a lane violation during the 200-meter final at the 2008 Olympics. As a result, Martina was stripped of his silver medal, which was subsequently awarded to U.S. sprinter Shawn Crawford. Crawford's teammate Walter Dix was also bumped up and received the bronze medal. The NAOC argued that Martina should not have been disqualified because the USOC failed to file its protest within thirty minutes of the final announcement of the results of the race, which was required under the IAAF rules. It also claimed that the USOC did not have Crawford's authorization to file the protest. Both the IAAF and the USOC argued that the CAS did not have jurisdiction to hear the appeal.

The CAS arbitrator determined he could hear the appeal under the Olympic Charter, which provides the CAS with jurisdiction over any dispute that arises out of the Olympic Games and cannot be inhibited by the rules of an international federation. However, the arbitrator concluded that both the IAAF rules and the "field of play" doctrine barred him from overturning the decision of the Jury of Appeal. After examining other CAS cases, he determined that the scope of the IAAF rules and the doctrine could be expanded to include decisions related to the timely filing of a protest or the authority of a committee to lodge an appeal. The arbitrator noted that the IAAF rules provided no grounds for challenging the decision of a Jury of Appeal, which not only rules on the merits of a protest, but whether the organization filing it complied with all procedural requirements. Both of those evaluations make up a "field of play" decision about an event and its results, which cannot be overturned by CAS panels.

*NOC of Swed. v. Int'l Olympic Comm.*<sup>72</sup>

The Swedish Olympic Committee (SOC) and Swedish Greco-Roman wrestler Ara Abrahamian appealed the IOC Executive Board's decision to accept the recommendation of an IOC disciplinary commission to strip him of the bronze medal that he won at the 2008 Olympics after he engaged in a symbolic protest during the medal ceremony. During the second period of a semifinal match, the referee indicated that he wanted to give a

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71. CAS 2008/A/1641.

72. CAS 2008/A/1647.

warning to Abrahamian, the silver medalist at the 2004 Games. That decision would have cost Abrahamian a point and given a point to his opponent. However, the ringside judge opposed the award by lighting a white lamp, which required the mat chairman to make a deciding vote on whether a warning should be issued. But the mat chairman failed to intervene, and the period continued. Under FILA rules, a chairman's failure to intervene should be interpreted as agreeing with the ringside judge, so no warning was given. Abrahamian finished the period leading in points 2-1, tying the bout at and forcing a third and deciding period. But before the match resumed, a bout official determined that Abrahamian should have been given a warning. The second-period score was re-adjusted and, as a result, Abrahamian's opponent was declared the winner. SOC officials immediately protested the decision, asking for a video check under FILA rules. But the federation's officials did not comply with the request. The SOC appealed to the CAS Ad Hoc Division, complaining that the actions of the bout officials and the committee's lack of an appeals mechanism violated FILA rules and Abrahamian's right to know the standing of the bout at all times. Abrahamian, the two-time world champion, went on to win the bronze medal. However, he protested FILA's actions during the awards ceremony by stepping off the podium, placing his medal on the floor, and walking away. An IOC disciplinary commission investigated the ceremony incident and set up a hearing to allow Abrahamian to explain his actions. He told the commission that he was not disrespecting his fellow competitors or the Olympic Movement, but reacting to the way that FILA broke its own rules during and after his semifinal match. The commission concluded that an alleged judging mistake could not justify his behavior, and the IOC Executive Board accepted its recommended sanction. One week later, the CAS Ad Hoc Division ruled on the SOC appeal, finding that FILA failed to follow its own rules by not providing Abrahamian with an appropriate appeals mechanism. That decision prompted the SOC to ask the IOC to reconsider the penalty assessed against Abrahamian and to return the bronze medal. The IOC denied the request, prompting this second CAS appeal.

The CAS panelist upheld the IOC's decision, emphasizing that the Olympic Charter bifurcated the jurisdiction of the IOC and the international federations, so the IOC was only required to focus on the events at the medal ceremony when assessing the sanction. Thus, although the allegations of rules violations by FILA could have been used to evaluate Abrahamian's conduct, the IOC did not have to consider them. However, the panelist noted that the IOC actually took an expanded view of the circumstances by recognizing the allegations that were made in its decision. Finally, the panelistpanelists concluded that the IOC's sanction was not disproportionate because



Abrahamian's conduct was inappropriate, regardless of his motivation. Although it was easy to empathize with him due to the errors committed in the match, those errors did not justify usurping the medal ceremony. The panelists also determined that Abrahamian rejected his medal by placing it on the floor; therefore, it was not unjust to force him to live with the consequences of that decision.

*S.C. Fotbal Club Timisoara S.A. v. FIFA*<sup>73</sup>

S.C. Fotbal Club Timisoara S.A., a Romanian soccer club, appealed a FIFA decision that ordered the Romanian Football Federation (RFF), the national governing body for soccer in Romania, to deduct six points from the total the club earned in the 2008-2009 Romanian Liga 1 season for failure to comply with a CAS award that ordered the club to change its color scheme by a designated deadline for violating the intellectual property rights of SC FC Politehnica Timisoara S.A., another Romanian soccer club, as well as the RFF decision that implemented the FIFA order. In 2006, CAS settled an intellectual property dispute between the appellant, then acting under the name CS FCU Politehnica Timisoara, and SC FC Politehnica Timisoara S.A. by ordering the appellant to change its name and color scheme because they created a risk of confusion between the two clubs. The appellant changed its name, but not in a manner that satisfied SC FC Politehnica Timisoara S.A. Thereafter, FC Politehnica filed a complaint with FIFA. After When FIFA dismissed the complaint, FC Politehnica again appealed to CAS, which applied Article 71 paragraph 1 of the FIFA Disciplinary Code (FDC) and imposed a fine on the appellant. The CAS panel also ordered the appellant to change its name and eliminate violet from its color scheme by June 30, 2008, or six points would be deducted from the team's total pursuant to FDC Article 71 paragraph 2. Subsequently, the appellant adopted its current name and, five days before the deadline, requested uniforms with a new color scheme, which replaced the violet with mauve. It also instructed its online manager to substitute the new name and color scheme on the club's official website, although the change was not made until the fall.

On July 5, the RFF confirmed the changes in the club's name and color scheme and told club representatives to inform FIFA about the club's compliance with the CAS award. However, five days later, the deputy secretary to the FIFA Disciplinary Committee sent a letter to the appellant that claimed it had been informed that the club had not complied with the CAS award. Both the RFF and the appellant responded by faxing letters to FIFA

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73. CAS 2008/A/1658.

that claimed the club was in compliance. Without referring to those letters, FIFA asked the RFF to forward the club's official uniform. The RFF complied with the request, but sent the wrong kit, even though the appellant had previously provided the governing body with one of its new uniforms. Shortly afterwards, the deputy secretary sent a letter to the RFF that claimed an analysis of the club's uniforms and official website revealed that the club had failed to properly change its color scheme. The letter asked the RFF to deduct six points from the total that the team earned during the Romanian Liga 1 season. One day later, the RFF issued a decision implementing the FIFA request. The appellant appealed the "decision" of the deputy secretary to the CAS, as well as the RFF decision that implemented it. Subsequently, the appellant also filed an appeal with the FIFA Appeal Committee. That committee rejected the appeal because the club did not file it within the time limit provided by the FDC and failed to pay the appeal fee.

The CAS panel reversed the decisions of FIFA and the RFF, and ordered the RFF to restore six points to S.C. Fotbal Club Timisoara S.A.'s league total. First, the panel determined it had jurisdiction to rule on the appeal against the FIFA decision, finding the deputy secretary's letter constituted a formal "decision" made by the FIFA Disciplinary Committee and qualified as a "final" decision subject to appeal because all of the club's internal remedies were exhausted under the FDC. The panel noted that any FIFA decision issued under Article 71 could be immediately appealed to the CAS. Second, the panel set aside the FIFA decision, emphasizing that the decision was enforceable, but that the club had complied with its obligations under the prior CAS award in time. It found that there was a discrepancy between the club's stated obligations in the 2006 CAS award and the later award that established the June 30 deadline, and concluded that the club's compliance could only be measured by whether its new color scheme eliminated violet, regardless of whether the move to mauve was a practically indiscernible change. The panel also noted that FIFA was provided with the wrong kit to evaluate, and that the club had informed its online manager that its website needed to be changed prior to the deadline. Finally, the panel set aside the RFF decision, noting its effect was inexorably tied to the FIFA decision.

*Seroczynski v. Int'l Olympic Comm.*<sup>74</sup>

Polish kayaker Adam Seroczynski tested positive for a banned substance following his fourth-place finish in an event at the 2008 Summer Olympics in Beijing. It was his first anti-doping violation. Subsequently, an IOC

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74. CAS 2009/A/1755.

Disciplinary Committee disqualified him from the race and ordered the International Canoe Federation to modify the results of the event. The CAS panel upheld the IOC Disciplinary Commission's sanction, concluding Seroczynski's procedural rights were not violated and that the analytical findings did not indicate a "false positive." After assessing various witnesses' statements and testimony, the panel determined that the Beijing laboratory did not depart from the WADA International Standard for Testing, and that the low concentration of the banned substance in the athlete's body could not be the result of tainted food. It noted that the food controls performed during the Games were immaculate, and that Seroczynski was the only athlete to test positive for the designated substance. But more importantly, the panel emphasized that IOC rules mandated the disqualification of his results, even if there was an absence of fault or negligence on the athlete's behalf.

*Varis v. Int'l Biathlon Union*<sup>75</sup>

Finnish biathlete Kaisa Varis tested positive for a substance banned under IBU rules. She had previously been suspended for two years for using the same substance, so the IBU Executive Board imposed a lifetime ban from competition. Varis appealed, arguing that the test results should be discarded because the IBU did not reasonably attempt to accommodate her request to postpone the analysis of her "B" sample so she could have her nominated biochemical expert observe the proceedings. Under the international federation's rules, Varis had the right to request the analysis of her "B" sample and to have a representative observe the analysis after she was notified that her "A" sample had tested positive. But the rules also dictated that the analysis could take place up to three weeks after the notification. This requirement conflicted with the new 2008 version of the WADA International Standard for Laboratories (ISL), which stated that the analysis should be completed within seven working days. The IBU scheduled the analysis of the "B" sample seven days after Varis was notified. The Secretary General of the IBU claimed that he told Varis that the analysis had to be conducted sooner due to the change in the ISL, but did not confirm that notification in writing. Varis denied the conversation took place. The day before the scheduled analysis, Varis made an official request to postpone the date for at least one week because her designated expert was not yet available. The IBU turned down the request and stated, stating it would appoint an independent party to observe the procedure, although both its rules and the ISL required reasonable attempts to accommodate requests by an athlete when her representative was not free on

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75. CAS 2008/A/1607.

the scheduled date. The IBU eventually appointed one of its own employees as an independent observer and conducted the analysis on the following day. The “B” sample also came back positive.

The CAS panel reversed the decision of the IBU Executive Board, determining that Varis had not committed an anti-doping violation because the results of the “B” sample were invalid. It held that the IBU violated its own rules and the ISL in a fundamental manner by failing to reasonably accommodate Varis’s request. The panel emphasized that athletes have limited rights in the testing process, and that the right to be given a reasonable opportunity to observe the analysis is so important that the outcome of the test can be discarded, even if the departure from the rules did not cause the adverse finding. In this situation, the panel concluded that there was not enough evidence to find that the IBU was aware of the change in the ISL prior to conducting the analysis; thus, both the federation and the athlete were proceeding on the basis that the three-week window still governed. Pushing back the scheduled date of the analysis within that window was a perfectly reasonable request because Varis’s sample would not have been compromised by the delay. Moreover, even if the IBU was aware of the change, the panel found that its accommodations were lacking because it did not schedule the analysis seven *working* days after notifying Varis and it failed to recognize that the WADA standards allow for later testing due to technical or logistical problems.

*Volandri v. Int’l Tennis Fed’n*<sup>76</sup>

Italian tennis player Filippo Volandri tested positive for a high concentration of salbutamol, which is a banned substance under ITF rules. It was his first anti-doping violation. Volandri had a Therapeutic Use Exemption (TUE) to use a salbutamol-based medicine to treat his asthma, but the presence of the substance in excess of 1,000 ng/ML was considered a violation unless an athlete proved the high concentration was the consequence of a necessary therapeutic dose. On his application form for the TUE, Volandri indicated he would inhale two 100 mcg puffs of the medicine twice daily, but also stated that he may need two additional puffs in an emergency situation. In March 2008, Volandri was awakened by a serious asthma attack just hours prior to his first match at a tournament in California. He summoned his trainer to his room, but did not follow the trainer’s suggestion to go to the hospital, believing he could regain control of his breathing on his own. Volandri took between ten and twenty puffs of the medicine over a two-hour

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76. CAS 2009/A/1782.

period before his breathing finally stabilized. Later that day, he lost his first-round singles match and was subjected to a doping test. The results indicated he had a concentration of salbutamol in excess of 1,000 ng/ML. The ITF's anti-doping tribunal held that the high concentration was not intended to enhance his performance and chose not to disturb the match results that Volandri had obtained prior to the date that he became aware of a possible violation. Nevertheless, it disqualified his results from the California tournament and the other tournaments in which he participated after July 2008, when he was made aware of his positive test, and also imposed a three-month suspension from competition.

The CAS panel modified the penalty imposed by the tribunal. It determined that the tribunal's decision was arbitrary because the TUE and Global Initiative for Asthma (GIA) guidelines should have been interpreted to allow Volandri to take up to thirty-two puffs of his medication between the evening prior to the attack and his first-round match. The panel also disagreed with the tribunal's conclusion that Volandri had a life-threatening attack and should have sought medical assistance. It emphasized that he was alone and far from home when the attack occurred; therefore, he was in the best position to determine what was right for him. Combining that conclusion with the fact that Volandri barely exceeded the concentration threshold and could not be faulted for playing after traveling to California, the panel used its discretion to eliminate the suspension. In addition, it found that the ITF committed unacceptable mistakes during the process of bringing the doping charge. The panel emphasized that Volandri was not notified of a possible violation until five months after the California tournament, and he was not adequately informed of the consequences of continuing to compete. Therefore, it decided that the results from all tournaments except the March event in California should be reinstated. However, it upheld the doping violation, finding that Volandri failed to meet his burden of producing evidence that showed how the concentration of the banned substance found in his doping test could be the result of his therapeutic use.

*World Anti-Doping Agency v. CONI*<sup>77</sup>

The WADA challenged an Italian Olympic committee appeals panel's decision that held the national governing body for soccer in Italy erred in determining professional soccer player Nicolo Cherubin could not be sanctioned for violating the operating instructions of the Olympic committee's anti-doping commission prior to a drug test but did not address the national

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77. CAS 2008/A/1551.

governing body's failure to charge him with violating the Olympic committee's anti-doping rules. Cherubin was selected to take a drug test following a soccer match involving his team, Reggina Calcio S.p.A., in "Serie A," the top professional Italian league. After arriving at the anti-doping control station, he left to go to the locker room without providing a sample. After arriving at the locker room, he participated in a team meeting resulting in the termination of the Reggina Calcio coach, and then showered. Approximately thirty minutes later, he returned to the anti-doping control station and provided his required sample. The test turned out negative. The Olympic committee's anti-doping prosecutor investigated the incident and charged Cherubin with violating the committee's operating instructions for showing a lack of cooperation in the completion of the anti-doping procedures. He sought a one-month suspension from competition. The national governing body dismissed the charges, finding that the operating instructions did not provide an explicit sanction that could be imposed. But more importantly, it failed to address the prosecutor's decision not to charge Cherubin with violating the Olympic committee's anti-doping rules, which penalize athletes for refusing or failing to submit to an anti-doping test without compelling justification. The committee's appeals panel reversed the national governing body's decision and suspended Cherubin for one month, emphasizing that the operating instructions included a specific provision allowing players to be sanctioned. However, like the national governing body, it failed to consider whether Cherubin violated the Olympic committee's anti-doping rules. The CAS panel upheld the decision, determining that the testimony of the national governing body's officials did not establish that Cherubin was actually told not to leave the anti-doping control station when he first arrived. The panel emphasized that Cherubin was at the location for less than a minute and that, during that time, he witnessed officials take two players from the opposing team to go take a shower before submitting to a test, while the remaining officials were all busy with one of Cherubin's teammates. Based on those facts, the panel found Cherubin was not on notice that leaving the anti-doping control station could result in being sanctioned, so he did not actually refuse or fail to submit to a drug test in the manner proscribed by the Olympic committee's anti-doping rules.

*World Anti-Doping Agency v. Int'l Ice Hockey Fed'n*<sup>78</sup>  
*World Anti-Doping Agency v. DEB*<sup>79</sup>

In combined cases, the WADA appealed (1) the International Ice Hockey Federation's (IIHF) decision to decline to initiate a disciplinary proceeding against German hockey player Florian Busch on procedural grounds after the national governing body for hockey in Germany chose not to suspend him for refusing to take an unannounced out-of-competition anti-doping test, and (2) the decision of the ad-hoc-Court of Arbitration of the German Olympic Sports Confederation (GOSC) to decline to suspend Busch from competition after it held that there was no legal basis to sanction him. Busch refused to take an unannounced anti-doping test after a anti-doping control officer showed up at his home. The control officer warned him that refusing to take a test could result in disciplinary sanctions and offered to conduct the test at another location. Busch declined this proposal, and the officer left the home after getting him to secure his position in writing. Less than five minutes later, Busch called the German National Anti-Doping Agency (NADA) and explained what had happened. An hour later, he contacted the NADA again, announcing that he had changed his mind and would go ahead with the test. The NADA informed him that a later test was not possible because it would defeat the purpose of unannounced visits. Busch then called his national governing body, which quickly arranged for him to take an anti-doping test later that afternoon. The test was conducted by the same control officer that had shown up at his home four-and-a-half hours earlier. The results did not reveal the presence of any banned substance. The NADA informed the national governing body that Busch had violated the NADA Code for refusing a doping test and was subject to a two-year suspension. But the national governing body committee in charge of sanctioning players for missed tests refused to suspend him. The NADA informed the WADA, which asked the IIHF to initiate a disciplinary proceeding and sanction Busch with a two-year suspension for violating the international federation's rules. However, the IIHF claimed that it could not initiate a proceeding because the appeals process laid out in the NADA Code had not been exhausted. The WADA treated the IIHF's response as a "decision" under the international federation's rules that allowed it to appeal to the CAS. It also submitted a list of questions to the national governing body to determine if it had the right to appeal the governing body's decision to the CAS under the NADA Code. The governing body claimed its decisions could only be appealed to the German National

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78. CAS 2008/A/1564.

79. CAS 2008/A/1738.

Court of Arbitration for Sports (GNCAS). However, that court had not yet been established. Therefore, it claimed any appeal had to be made to GOSC's ad-hoc court.

The CAS panel dismissed the appeal against the decision of the GOSC's ad-hoc court, emphasizing that the NADA Code only provided the WADA with the right to appeal the national governing body's decision to the GNCAS, even if it was not yet established. Therefore, the panel treated the response of the national governing body to the WADA's list of questions as an offer to enter into a special arbitration agreement, and nowhere in that agreement was the WADA given the right to appeal to the CAS. The panel held the WADA accepted that agreement by filing the appeal with the GOSC's ad-hoc court, which issued an order prior to the case that confirmed its award would be final and binding. However, panel set aside the IIHF's decision and suspended Busch for two years for violating the WADA Code by refusing to submit to the unannounced out-of-competition test. The panel concluded that the CAS had jurisdiction to hear the dispute because the WADA had timely submitted its request that the IIHF initiate disciplinary proceedings and the international federation's response constituted a final decision on the matter. Although that response did not address the merits of the dispute, the panel determined that it was a unilateral act intended to produce legal effects and left the WADA without further internal remedies. It emphasized that the IIHF rules did not require the WADA to appeal to the GOSC's ad-hoc court, regardless of whether the national governing body had adopted a national anti-doping code with alternative appeals procedures. Finally, the panel noted that the question of whether Busch could effectively mask a prohibited substance during the period of time before he finally submitted to a test had no legal relevance under the circumstances. It also refused to give Busch full credit for not participating in events sponsored by the national governing body or the IIHF since the incident because he was still playing in the German professional league, and the WADA Code prohibited an individual declared ineligible due to an anti-doping violation from playing his sport altogether. However, Busch was given credit for two months of service because he had been prevented from engaging in international competitions and sanctioned in other manners by the national governing body.

#### CRIMINAL LAW

While there are very few criminal laws that directly address the world of sports, neither amateur nor professional athletes are immune from being punished for acting outside the bounds of legally-acceptable behavior. Or to put it more succinctly, criminal laws do not distinguish one class of



individuals from another; everyone is in the same boat. The following cases show that crimes can be committed on as well as off of the field of play, and that leagues may have legal recourse against sports figures that cross the line.

*In re J.S.I., Child*<sup>80</sup>

A high school wrestler appealed a trial court's decision adjudicating him to be a delinquent after he was charged with fifth-degree assault for striking an opponent with a closed fist during a match. The appellate court affirmed, holding that the evidence was sufficient to support the decision because the testimony of witnesses, the referee's report to the state's high school athletic association, and a video recording of the match indicated that the defendant was not attempting a wrestling move but deliberately trying to inflict bodily harm on his opponent.

*People v. Phillips*<sup>81</sup>

Former professional football player Lawrence Phillips appealed a trial court's decision to deny his motion to vacate a judgment confirming his agreement to plead guilty to two criminal charges filed against him and his petition for a writ of habeas corpus. Phillips was charged with committing seven state crimes after he pushed, slapped, and strangled his girlfriend during an argument, then threatened to kill her. After posting bail, Phillips missed his original trial date because his attorney advised him that it was not set for another six days. But after learning that a warrant had been issued for his arrest, Phillips flew to Los Angeles and surrendered to the court the next morning. Although Phillips was not at fault, the court indicated that it would remand him into custody. Phillips lacked the financial resources to post bail again, and going to jail would have cost him the ability to play for the now-defunct XFL team in Las Vegas in the upcoming season. Therefore, he agreed to plead no contest to two of the charges, including one that carried a strike penalty. He was sentenced to 180 days in jail, but the sentence was suspended until the end of the XFL season.

The appellate court affirmed, holding there was no abuse of discretion in finding that Phillips's plea was valid and that his attorney's actions were based on an informed tactical choice. In assessing the plea agreement, the court found that Phillips knowingly and voluntarily entered into the plea agreement and was aware of the fact that it included a strike. The court also noted that Phillips had never previously indicated that he wished to withdraw his plea

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80. 2009 Minn. App. LEXIS 140 (Minn. Ct. App. Feb. 3, 2009).

81. 2009 Cal. App. LEXIS 1845 (Cal. Ct. App. Mar. 5, 2009).

and that the prosecution's failure to disclose evidence relating to the victim did not prejudice him. In fact, Phillips could have discovered that evidence prior to the time that he moved to vacate the judgment. Finally, the court emphasized that relief could have been denied based solely on the fact that it took Phillips seven years to make the motion, during which he made forty-five court appearances without indicating that he made his plea under duress. In denying the petition for a writ of habeas corpus, the court emphasized that Phillips was only punished for two of the seven crimes that he was charged with committing and that the state had allowed him to postpone his jail sentence even though a strike was involved.

*United States v. Battista*<sup>82</sup>

James Battista, a co-conspirator in the NBA gambling scandal involving former league referee Tim Donaghy, appealed a district court's judgment on his guilty plea for conspiracy to transmit wagering information that ordered him to pay restitution to the league as a victim of the offense under federal law. Under the conspiracy, Donaghy provided picks on NBA games to a middle man, who then relayed those picks to Battista to place bets. In exchange, Battista paid Donaghy a fee for every correct pick. The NBA sought restitution in the form of (1) the compensation it paid to Donaghy for games in which he had a financial interest; (2) the compensation it paid to employees to review the tapes of the games Donaghy refereed; and (3) the attorney fees incurred in assisting the government in its investigation of the case. The district court ordered Battista, Donaghy, and the middleman to pay over \$217,000 in restitution.

The Second Circuit affirmed the order, holding restitution was properly imposed under the federal Victims and Witnesses Protection Act (VWPA), which enables courts to impose restitution for crimes that may or may not be covered under the Mandatory Victims Restitution Act (MVRA), another federal law. In assessing whether the NBA could recover under the VWPA, the court emphasized that the league was a "victim," as statutorily-defined, because it was not only harmed by Battista's use of the nonpublic information he received, but his role in the conspiracy, which encompassed the acts of his co-conspirators. The court also found Battista's external financial obligations were not so great as to exempt him from paying, and that shielding him would prevent it from according equal treatment to his co-conspirators, who were ordered to pay mandatory restitution because their crimes fell under the MVRA. Finally, the court determined the NBA's attorney fees were

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82. 575 F.3d 226 (2d Cir. 2009).

recoverable because the VWPA allows victims to seek restitution for expenses related to participation in the investigation of an offense.

*United States v. Bonds*<sup>83</sup>

Former professional baseball player Barry Bonds moved *in limine* to exclude several categories of evidence from his trial, in which he is charged with making false statements to a grand jury and obstruction of justice during the BALCO investigations. Federal agents seized the evidence from BALCO and the residence of Bonds's personal trainer, who refused to testify at trial. The court granted the motion with respect to all of the evidence except (1) a note allegedly written by Bonds's trainer that was seized from BALCO; (2) part of a tape-recorded conversation between the trainer and Bonds's personal assistant in the San Francisco Giants locker room; and (3) the expert testimony of a government witness on the side effects of HGH and anabolic steroid use. The court also directed the government to file a declaration containing an offer of proof of adequate factual foundation from its lay witness, Bonds's former girlfriend Kimberly Bell, before assessing whether she could testify about changes in Bonds's physical or mental condition. The court excluded the majority of the evidence because it could not be authenticated, noting that there was a serious gap in the chain of custody because his trainer refused to testify and there was no hearsay exception through which it could be admitted. In excluding part of the tape-recorded conversation, which detailed a strategy for evading Major League Baseball's drug testing procedures, the court held that the government could not establish that it was a criminal or civil offense to help athletes avoid detection at the time the statements were made. Thus, they were not admissible as statements against interest.

#### DISABILITY LAW

The rights of disabled athletes have received a renewed focus since the United States Supreme Court's landmark decision in *PGA Tour, Inc. v. Martin*. Their rights are protected chiefly by a series of federal laws, including the Americans with Disabilities Act. As a general matter, those laws require both private and public entities to make reasonable efforts to accommodate the needs of disabled individuals. The following cases exemplify how disabled individuals have attempted to use both federal and state law to compete alongside healthy individuals and enjoy many of the luxuries that are often taken for granted.

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83. 2009 U.S. Dist. LEXIS 16120 (N.D. Cal. 2009).

*Barron v. PGA Tour, Inc.*<sup>84</sup>

Professional golfer Stephen Barron moved for a temporary restraining order in a lawsuit that he filed against the PGA Tour after he was suspended from the competition for using banned substances that had helped him offset his abnormally low levels of testosterone. By taking the prescribed substances, Barron was able to engage in a normal sex life, avoid chronic fatigue, and maintain his immune system. However, the PGA Tour denied his application for an exemption to use them. When he subsequently tested positive for the drugs during a PGA Tour event, he was suspended from competition for one year. He challenged the organization's right to impose that discipline under the Americans with Disabilities Act (ADA) and state contract law, and sought an injunction in order to compete in the second leg of the PGA Tour's upcoming "Q-School."

The court denied the motion, holding that Barron's inability to demonstrate a likelihood of success on the merits of his claims, the public interest in protecting other golfers who have abided by the PGA Tour's anti-doping rules, and the public interest in enforcing anti-doping policies in professional sports outweighed the irreparable harm caused to Barron by prohibiting him from competing in the qualifying event. After assessing the ADA claim, the court concluded that Barron could not show that the PGA Tour failed to provide him with reasonable accommodations under the law. Although his condition fit the definition of a disability, the court determined that the requested accommodation was not necessary for Barron to continue to play golf. After assessing his remaining claims, the court concluded that the PGA Tour's drug testing program was not unconscionable under Tennessee law and that the decision to deny Barron's application for an exemption was not made in bad faith or arbitrary and capricious. The court emphasized that the PGA Tour afforded Barron numerous opportunities to appeal its determination, and that Barron had not taken advantage of all of them. It also noted that the sanction was imposed retroactively to enable Barron to participate in Q-School in 2010.

*Eames v. S. Univ.*<sup>85</sup>

Southern University moved to dismiss claims brought against it by a disabled individual who wished to secure access to the school's football and basketball programs after the university failed to comply with its commitment to resolve issues related to the accessibility of its facilities, which was

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84. 670 F. Supp. 2d 674 (W.D. Tenn. 2009).

85. 2009 U.S. Dist. LEXIS 97452 (M.D. La. Oct. 16, 2009).

prompted by the individual's complaint to the Office of Civil Rights. The individual alleged that the university's failure to make necessary alterations continued to deprive him of the opportunity to participate in or benefit from those athletic activities. He brought suit under both the Americans with Disabilities Act and the Rehabilitation Act, as well as two state laws, seeking a permanent injunction to prevent the school from avoiding compliance with its commitment and damages associated with its prior violations.

The court denied the motion, holding that (1) the individual's claims were not barred by the statute of limitations; (2) he could seek damages for intentional discrimination under the federal laws; and (3) he could seek specific performance as a third-party beneficiary of the university's commitment. In assessing whether the complaint was time-barred, the court emphasized that the individual's claims were not "facility accessibility" claims, but "program accessibility" claims; therefore, they did not begin accruing on the date of the university's last alterations to the facilities. The court found a different interpretation would destroy the requirement to provide meaningful access to programs because government entities could merely move them between non-compliant facilities. In assessing whether damages were available, the court emphasized that the university had knowledge of the individual's disability and that its breach of the commitment would continue to deny him access to the athletic programs. Finally, in assessing whether the individual qualified as a third-party beneficiary, the court emphasized that a party could be found to have implicitly stipulated to provide a benefit under state law, and determined that the circumstances in this case allowed for it. The court noted that the purpose of the commitment was to benefit disabled individuals, and that the university knew the plaintiff's access to its programs depended upon its compliance. Moreover, by fulfilling the commitment, the university knew it would be relieved of potential legal liability for its treatment of those persons.

#### DISCRIMINATION LAW

Individuals are protected from discrimination in many sports-related contexts by both federal laws and the Constitution of the United States. These protections primarily relate to discrimination based on gender, race, or age, which are severely limited or outright barred under the Fourteenth Amendment. However, both Title VII and Title IX legislation have provided additional security to athletes, coaches, and other individuals that are associated with entities that receive federal funds. That legislation not only prohibits discriminatory acts, but acts that retaliate against individuals seeking to enforce their rights or the rights of others. The following cases

demonstrate the types of discrimination that athletes face on and off the field of play and the types of discrimination that coaches face in the context of their employment.

*Baldwin v. Bd. of Supervisors*<sup>86</sup>

The Board of Supervisors for the University of Louisiana System and the athletic director at the University of Louisiana-Lafayette (ULL) appealed a trial court's judgment on a jury verdict in favor of former ULL head football coach Jerry Baldwin on several claims that he brought against the defendants after he was terminated in the fall of 2001 following three straight losing seasons. The defendants claimed that they fired him due to his poor record and the team's low attendance numbers at home games, which combined to create a budget crisis. They also argued that the low attendance numbers posed a threat to ULL's Division I-A status under NCAA rules. However, the jury awarded \$2 million in damages to Baldwin after finding that the defendants were liable for race discrimination, abuse of rights, tortious interference with contract, and negligent infliction of emotional distress. The appellate court reversed and remanded, holding in part that the trial court committed reversible error when it entered judgment on the jury's finding of race discrimination under state law. It found that the interrogatories on the verdict form were insufficient to find the defendants liable under state law, emphasizing that the jury's conclusion that Baldwin's race was a determining factor in his termination could only support a finding of discrimination under federal law.

*Cookson v. Brewer Sch. Dep't*<sup>87</sup>

High School softball coach Kelly Jo Cookson appealed a trial court's decision to grant summary judgment to the Brewer School Department and its superintendent on her claim that they violated Maine's human rights legislation and engaged in slander *per se* when the supervisor made false statements about her to the parents of some of her players and the department subsequently failed to renew her coaching contract. The mother of one of Cookson's former players had previously complained to the department about the coach after her daughter quit the team because Cookson subjected the players to verbal abuse and hazing. The department's former superintendent investigated the allegations in that complaint and issued a letter of reprimand after discovering at least one similar hazing incident had occurred the prior

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86. 11 So. 3d 1247 (La. Ct. App. 2009).

87. 974 A.2d 276 (Me. 2009).

season. After the defendant superintendant took over, the mother brought a tort claim against the school department based on many of the same allegations in her complaint. The superintendent met with Cookson after receiving notice of the claim but told her he was not thinking about firing her. However, he subsequently learned about the earlier complaint and letter of reprimand, and then found out Cookson was a lesbian. When he met with the parents of the players, he made a number of specific comments about Cookson and implied that her situation was similar to the situation of a staff member at one of his previous schools who had engaged in questionable behavior by getting involved with a nudist colony.

The Maine Supreme Court affirmed the decision in part and vacated it in part, finding Cookson had failed to offer evidence disputing the truth of the superintendent's statements, but had generated a genuine issue as to whether the department's proffered rationale for failing to renew her contract was a pretext for discrimination. The court noted the timing of the superintendent's decision not to recommend rehiring Cookson relative to when he became aware of her sexual orientation was a disputed fact. It also emphasized that he had initially indicated he would not request Cookson's resignation and had relied on hazing incidents for which she had already been punished.

*Davis v. Atlantic League of Prof'l Baseball Clubs, Inc.*<sup>88</sup>

The Atlantic League moved for summary judgment on age discrimination claims brought against it by former league umpire Clark Davis after it decided not to assign him to umpire playoff games in 2006 and then failed to renew his contract for the following season. The league's executive director allegedly told Davis that he was not assigned to playoff games because the league wanted to give some younger umpires some experience. However, the league justified both of its employment decisions as legitimate responses to (1) its assessment of Davis's performance that season; (2) complaints about his role in a regular season incident involving one of the league's playoff teams and its owner; and (3) his decision to take approved leave in the middle of the regular season to enter a poker tournament in Las Vegas.

The court denied the motion, holding a rational jury could doubt the league's articulated reasons for its decisions. In assessing the decision not to assign Davis to playoff games, the court emphasized that the league did not maintain written performance evaluations of its umpires and there was conflicting evidence related to the executive director's impression of the umpire's performance in previous years. The court also noted that Davis was

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88. 2009 U.S. Dist. LEXIS 46084 (D.N.J. June 2, 2009).

still permitted to umpire six games involving the playoff team after their incident, and that the league could have assigned him to another playoff series as it had in the past. Moreover, the league had ignored complaints about another umpire twenty years younger than Davis and given him a playoff assignment. Finally, the court noted that none of the articulated reasons for the league's decision were ever actually communicated to Davis. In assessing the decision not to renew his contract, the court found that the executive director's alleged statement to Davis related to his continued employment and constituted direct evidence of discrimination. It determined that there was a close temporal relationship between the statement and the contract decision, and that the statement could be interpreted to relate to his ability to do his job. The court noted that the league's supervisor of umpires had never disciplined Davis or recommended his termination and was unaware of the reason for the executive director's decision.

*Elborough v. Evansville Cmty. Sch. Dist.*<sup>89</sup>

A school district and its high school football coach moved for summary judgment on claims brought by female high school football player Ivyanne Elborough after they failed to ensure that the girls' locker room was unlocked prior to practice, kept all snacks and the team's practice schedule in the boys' locker room, and allowed her to participate in a contact drill at practice without any pads. Elborough also claimed that the coach told her to get her hair cut "like a boy." The practice incident happened after Elborough's mother complained about the way that her daughter was being treated and resulted in serious injuries. The court granted the motion in part and denied it in part. It held that Elborough failed to support her Title IX and Fourteenth Amendment substantive due process claims because she could not show that the school district had adequate notice of the discriminatory acts or that either defendant created the dangerous situation that resulted in her injuries. However, the court found that a reasonable jury could conclude that the coach violated her Fourteenth Amendment right to equal protection by allowing her to play without pads because of her sex and that both defendants were also liable for that decision under state law based on either the "known danger" exception to discretionary immunity or a theory of recklessness. In dismissing the Title IX claim against the school district, the court emphasized that the district did not have notice that the coach would allow Elborough to play at practice without pads, only that she had previously had trouble getting access to those pads in the locker room. But even if it had notice that she might

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89. 636 F. Supp. 2d 812 (W.D. Wis. 2009).



get hurt, the court found that notice would not be sufficient to show that the district was deliberately indifferent to the risk that she might be hurt *as a result of intentional sex discrimination*. The court concluded that none of the other alleged acts could give rise to a cause of action because the complaints by Elborough's mother did not give the school district reason to believe that she was the victim of intentional discrimination. It also noted that the acts themselves were not sufficiently severe or pervasive to prevent her from engaging in meaningful participation. In dismissing the substantive due process claim, the court noted that public officials have a duty to protect individuals only if the officials create a danger that poses a harm, and then found that the coach did not engage in an any affirmative act or omission which led to Elborough showing up at practice without pads or forced her to participate in the contact drill. In upholding the equal protection claim, the court determined that there was a genuine issue as to whether the coach acted with discriminatory intent in allowing Elborough to participate in the contact drill, especially in light of his normal response when a player appeared at practice without pads and his attitude toward Elborough's mother when she complained about the way that her daughter was being treated.

*Floyd v. Amite County Sch. Dist.*<sup>90</sup>

High school principal Charlie Floyd appealed a district court's decision to grant summary judgment to a school district, the school board, and various board members on claims that he brought after he was fired for allegedly allowing white students to participate in a private track and field training program that he conducted on district property. Floyd was serving as both the principal and track and field coach of the predominantly African-American school when the school board gave him permission to operate the program in the summer of 2002. However, he failed to notify the board that he would be inviting white students from private schools in the community to participate. Later that summer, the board adopted a policy that prevented school administrators like Floyd from holding more than one position in the district. As a result, Floyd resigned as the school's track and field coach to keep his job as principal. However, that fall, Floyd was fired as principal after an investigation by the district superintendent revealed that he was improperly performing his job duties. In response, Floyd sued, claiming his termination was the result of his decision to allow white students to participate in the track and field program. He introduced evidence indicating that the president of the board was biased against him for assisting those students.

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90. 581 F.3d 244 (5th Cir. 2009).

The Fifth Circuit affirmed, holding Floyd could not establish that he was discriminated against on the basis of his race when he was fired, and that the district court did not err in dismissing any of his various state law claims. In assessing the race discrimination claims, the court emphasized that Floyd failed to assert he was fired because he associated with the white students; instead, the evidence showed only that the school board president was angry that Floyd allowed those students to participate. The court noted that Floyd's attorney admitted animus about mixing races would have cost his client his job regardless of whether if he was black or white. The court dismissed the state law claims for breach of contract and intentional infliction of emotional distress because good cause existed for his termination and the defendants' alleged conduct was not outrageous enough to shock the conscience.

*Green v. East Aurora Sch. Dist. No. 131*<sup>91</sup>

A school district moved for summary judgment on claims brought against it by middle school track and field coach Robert Green after it failed to appoint him to a coaching position for the 2007-2008 school year and reprimanded him when it received complaints that he had engaged in inappropriate conduct. Green had coached a variety of sports at the elementary, middle, and high school levels after joining the school district as a certified teacher, and earned as much as \$2,000 per year for each of those additional jobs. He had also completed courses in sports first aid and coaching principles. But prior to the 2005 track and field season, he was asked to resign from his position because of complaints about his behavior. Following that request, Green filed a charge of unlawful discrimination with the Equal Employment Opportunity Commission (EEOC). He was allowed to remain as coach for that season, but was not appointed to any positions the following year, despite school district policies that allegedly prohibited teachers who had not completed courses in sports first aid and coaching principles from obtaining positions and gave certified teachers a preference over non-certified teachers in the hiring process. In January 2006, Green filed another charge of unlawful discrimination with the EEOC. Later that year, he was formally disciplined for four separate incidents of inappropriate conduct and transferred to the position of an in-school suspension teacher.

The court granted the school district's motion on one of Green's two Title VII retaliation claims but denied the motion on all of his other claims. In assessing his Title VII age and race discrimination claims, the court held that there was a dispute about Green's record of misconduct that needed to be

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91. 2009 U.S. Dist. LEXIS 9162 (N.D. Ill. Feb. 5, 2009).

sorted out in order to determine (1) why he was asked to resign from his position as track and field coach; (2) why younger, white, non-certified individuals who had not taken the required courses were appointed to positions over him for the following school year; and (3) why he was not considered for the position of wrestling coach when it opened up in the fall of 2005. In assessing his Title VII retaliation claims, the court held that Green had engaged in protected activity when he filed his first complaint with the EEOC, and again emphasized that the dispute about his prior behavior needed to be ironed out. However, it found that Green could not support his retaliation claim based on the discipline that he received for his allegedly inappropriate conduct because he could not establish a similarly situated employee was treated more favorably.

*Hemmer v. Gayville-Volin Sch. Dist.*<sup>92</sup>

A school district and its superintendent moved for summary judgment on claims brought against them by former high school golfer Brook Hemmer after her coach induced her into a sexual relationship while she was a sixteen-year-old sophomore. Hemmer had intercourse with the coach for the first time in a hotel room at the site of the state golf tournament in 2006. She had not qualified for the event but got permission to accompany a friend on the trip from the superintendent. Over the next two weeks, Hemmer and her coach had intercourse on two more occasions at his home. When the school district finally learned of their relationship, it reported the abuse to the state's department of social services and forced the coach to resign. Four years earlier, the coach had been accused of other inappropriate sexual behavior when he touched a teacher on the buttocks during a conference. Although the incident was not reported to the school district, the superintendent heard the news and asked the teacher if she would accept an apology for the coach's conduct. That same teacher later claimed that she had observed the coach get too close to female students and received complaints about his conduct. A second teacher also claimed that she observed the coach flirt with another female student and overheard him talking with Hemmer about meeting after school. None of those events were ever reported, but the school district was aware of the prior questionable behavior. In 2003, a school district board member publicly stated that the coach should not be placed near high school girls because another board member noticed that he was spending his free time with them. In addition, a third teacher held a secret meeting at her house to discuss the coach's alleged flirting with eighth-grade girls. Two board

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92. 2009 U.S. Dist. LEXIS 14379 (D.S.D. Feb. 20, 2009).

members were in attendance at that meeting but did not follow up on the complaints or even document that it took place. Hemmer claimed that the school district and the superintendent acted with deliberate indifference to the known risk that her Fourteenth Amendment substantive due process rights could be violated and engaged in negligent supervision under state law.

The court granted the defendant's motion on all of Hemmer's claims. It concluded the coach's conduct towards the teacher at the conference and the other alleged misconduct did not show the existence of a persistent pattern of unconstitutional misconduct, which is required to establish a § 1983 claim for failure to investigate and act upon complaints of violations of constitutional rights. It also determined that any inadequate sexual harassment training could not be considered the cause of Hemmer's injuries because the coach was clearly abusing his position of authority. The court found Hemmer's state law claims lacking for similar reasons. She could not prove it was reasonably foreseeable to the school district or the superintendent that the coach would engage in an inappropriate sexual relationship with a student because there was no evidence that he touched, attempted to touch, or even desired to touch a student in that manner. In addition, the superintendent could not be found liable in his individual capacity because none of the policies that he allegedly violated imposed a ministerial duty to respond in a specific manner.

*J.A. v. Vill. of Ridgewood Bd. of Educ.*<sup>93</sup>

The father of a sixth-grade girl who was denied the opportunity to play on a boys' basketball team in a recreational league sponsored by a private organization moved for summary judgment on his claim that a school board and its superintendent violated his daughter's rights under New Jersey's anti-discrimination law. Both defendants also moved for summary judgment on that claim. The plaintiff's daughter wanted to play on a boys' team because the boys used standard ten-foot high hoops, while the girls were forced to use baskets a foot-and-a-half shorter. The board allowed the private organization to lease its gymnasiums to hold practices and games even though the state law prohibited discrimination in places of public accommodation. The court granted summary judgment to the board and the superintendent, holding that neither defendant engaged in indirect discrimination or aided and abetted the private organization in its discriminatory practice. The court noted that the superintendent would have allowed the girl to play on the boys' team but did not control the organization or its basketball program. More importantly, the court found that the defendants did not substantially assist the organization in

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93. 2009 U.S. Dist. LEXIS 41100 (D.N.J. May 13, 2009).

its discriminatory practice because they did not encourage it to prevent the girl from playing on the boys' team. In fact, both the superintendent and members of the board warned the organization against engaging in unlawful discrimination on multiple occasions and had tried to resolve the dispute between the organization and the girl's family.

*Maier v. Canon McMillan Sch. Dist.*<sup>94</sup>

A school district and its named employees moved for summary judgment on claims brought against them by the parents of a high school softball player after she was coerced into a sexual relationship with a volunteer assistant coach. The plaintiffs' daughter first met the coach while playing for the school's recreational fall ball team in 2005. The following spring, she played on the school's junior varsity squad. Over that time period, the coach socialized with the plaintiffs and was a guest in their home, but made secret telephone calls to their daughter on a phone issued by the school district. The sexual relationship began at some point in the fall of 2005, with activity occurring during and after school on school property and in the plaintiffs' home. The coach also gave the plaintiffs' daughter rides home from practice, despite a directive from the school principal that prohibited coaches from giving rides to players. However, the plaintiffs were aware of these rides and did not object. In February 2006, the plaintiffs discovered that their daughter was engaging in late night phone calls with the coach and notified the director of the school's softball program, who then relayed that information to the school's principal. In a meeting held three days later, the school first learned of the coach's routine of driving the plaintiffs' daughter home from practice. Following the meeting, the school notified the coach that he was not to make further contact with softball players until the matter had been resolved. Subsequently, the school district superintendent decided to formally terminate the coach from his position and requested that he also quit his IT job with the district. The coach resigned shortly afterwards.

The court partially granted the defendant's motion, holding that the parents could not establish to raise a genuine issue of material fact that showed the defendants violated their daughter's Fourteenth Amendment right to bodily integrity by failing to adequately investigate, supervise, and train the volunteer coach or created an environment of sexual harassment that deprived their daughter of educational opportunities in violation of Title IX. In assessing the § 1983 claim against the school district employees, the court found that the plaintiffs failed to show that any of the employees had actual knowledge of

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94. 2009 U.S. Dist. LEXIS 74342 (W.D. Pa. Aug. 20, 2009).

facts that pointed toward sexual abuse of their daughter, or, even if they did, that they were deliberately indifferent to it. The court noted that the director of the softball program only knew that the coach had previously spent the night at the home of another player with permission from her parents, and that other members of the team had reported that he was acting differently with the plaintiffs' daughter. In assessing the § 1983 claim against the school district, the court found that the plaintiffs failed to show that the district's policies and customs played a role in bringing about the abuse or that the district was deliberately indifferent to the possibility of it. The court emphasized that the district did not have to review and investigate all calls made by the coach on his district-issued phone, and that the director of the softball program was not required to act on the report from other members of the team, especially when rumors run rampant in high school settings. The court also pointed out that the district's employees were aware of the district's views on sexual harassment, which were spelled out in a written sexual harassment policy and the school's student handbook. Finally, in summarily dismissing the Title IX claim against the district, the court noted that the standard for liability was even tougher to meet than the standard under § 1983 because the employees had to have actual knowledge of sexual misconduct, not just knowledge of the risk of misconduct. As a result of its decision, the court declined to exercise supplemental jurisdiction over the plaintiffs' state law claims and dismissed them without prejudice.

*Miles v. Washington*<sup>95</sup>

The state of Oklahoma and three individuals employed by Carl Albert State College (CASC) moved to dismiss several claims in a lawsuit brought against them by a former CASC women's basketball player for their actions after she was allegedly raped by an assistant coach following a party. The player claimed that the school's head women's basketball coach told her not to report the incident and that she was harassed and threatened by teammates when they learned that the assistant had been fired for drinking alcohol with her at the party. She obtained a protective order against three of her teammates, including the assistant's stepdaughter, but was forced to sit through a hearing at which both the head coach and the school's athletic director allegedly expressed their disgust with her. Both the head coach and others at the school allegedly knew that the assistant had been partying with female students and inappropriately interacting with them prior to the alleged rape.

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95. 2009 U.S. Dist. LEXIS 7300 (E.D. Okla. Feb. 2, 2009).

The court granted the motion in part and denied it in part, holding that the player had sufficiently alleged causes of action for Title IX sexual harassment, Title IX retaliation, negligent supervision, and intentional infliction of emotional distress, as well as claims against the individual defendants in their individual capacities for violating her Fourteenth Amendment right to equal protection and her First Amendment right to freedom of speech. After assessing the sexual harassment and negligent supervision claims, the court concluded that the allegations supported a finding that the school had actual notice of the assistant's behavior, allowing the player to establish that the defendants acted with deliberate indifference to the risk that he posed. After assessing the retaliation claim, the court found that the allegations supported a finding that the defendants knew about the teammates' harassment but responded in a manner suggesting that they condoned it. After assessing the equal protection claim, the court determined that the allegations supported a finding that the defendants were deliberately indifferent to the harassment she suffered and then allowed a hostile environment to develop after she reported the rape. In assessing the free speech claim, the court noted that reporting a rape is speech protected by the federal constitution; thus, any retaliation against a report would be unlawful. Finally, the court found that the allegations supported a finding that the defendants' behavior was outrageous enough to bring a claim for intentional infliction of emotional distress.

*Pettigrew v. Cherry County, Neb. Sch. Dist. No. 6*<sup>96</sup>

A school district moved to dismiss an Age Discrimination in Employment Act (ADEA) claim brought against it by Bud Pettigrew after the district failed to hire him as the head coach of its high school football team and instead hired an individual who was fifteen years younger. The district claimed Pettigrew's poor interview was the biggest factor in the decision not to hire him. The court denied the motion, holding that there was direct evidence to support a *prima facie* violation of the ADEA and evidence that the district's stated reason for not hiring Pettigrew was a mere pretext for discrimination. In finding that Pettigrew had established a *prima facie* violation, the court noted that two of the three members of the hiring committee made discriminatory comments that were directly related to the hiring decision. In assessing whether the district's stated reason was a pretext for discrimination, the court noted that the hiring committee members told a state entity investigating Pettigrew's charge that his interview had went okay, which was arguably inconsistent with the district's stated reason.

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96. 2009 U.S. Dist. LEXIS 49186 (D. Neb. June 11, 2009).

*Rickert v. Midland Lutheran Coll.*<sup>97</sup>

Midland Lutheran College (MLC) moved for summary judgment on claims brought against it by former MLC women's volleyball coach Joan Rickert after school failed to hire her in a full-time coaching capacity or as its student activities director (SAD) and dropped the part-time positions that she previously held while she was being treated for breast cancer. MLC informed Rickert when she was hired that it hoped to eventually make the coaching position full-time. However, it also stated it would offer the position to all potential applicants when that time occurred. Subsequently, Rickert was also hired as the school's part-time SAD, giving her full-time employment at the school. Three years later, she was diagnosed with cancer. However, she never missed any work, and her subsequent chemotherapy treatments only required minor deviations from the volleyball team's normal practice schedule. But shortly afterwards, MLC decided to make the SAD a full-time position, and Rickert was forced to quit that job so she did not have to resign as the volleyball coach in the middle of the season. As a result, she also lost her office. At the time, the school was also renovating its athletic facilities. Office space was scarce, forcing several coaches to work in small, converted areas. Unable to find immediate room for the plaintiff, the school's athletic director asked her to work from home until space became available. Eventually, the athletic department secured her an office in a house located three blocks from the athletic facilities, but near residential halls, giving her easy access to student-athletes. However, the office lacked amenities that Rickert deemed necessary for her to communicate with her players and the rest of the school's coaching community. To prevent Rickert from losing her medical benefits, the school also upgraded her to a two-thirds-time position, only asking that she hold some camps and club tournaments to raise money for the program.

During this time period, MLC was also implementing a plan to strengthen its overall athletic program. As part of the plan, the school decided to make the volleyball coach a full-time position. But rather than give that job to Rickert, the school opened up the position to all interested applicants. MLC established a search committee to make a recommendation, just as it had when it hired two of the other three coaches brought in under the current athletic director. Rickert was one of five applicants identified as a candidate for the position. All five interviewed with the committee and met with the current volleyball players, whose opinions were given weight in the ultimate recommendation. The only reference to age during the entire process was one

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97. 2009 U.S. Dist. LEXIS 78886 (D. Neb. Sept. 2, 2009).



committee member's reference to another candidate's "youth" as a positive trait, and there was no evidence the plaintiff's cancer was identified as a potential issue. Rickert was eventually identified as the committee's fourth choice.

The court granted the school's motion, holding Rickert's cancer did not render her disabled under federal or state law, and that MLC's conduct both before and during the process of hiring a full-time volleyball coach was not a pretext for age discrimination. In assessing Rickert's disability discrimination claims, the court found that the cancer did not cause a physical or mental impairment that substantially limited her ability to work and that the school did not perceive her to have an impairment. It noted that the school did not limit her overall employment opportunities, emphasizing that MLC selected her as a finalist for the full-time volleyball coach position and that the search committee identified her ability to work through cancer as a positive trait that inspired her co-workers. In assessing Rickert's age discrimination claims, the court determined that MLC had legitimate, non-discriminatory reasons to hire a full-time volleyball coach by using a search committee and to choose another candidate, and that the plaintiff could not establish those reasons were a pretext. It noted that MLC was in the midst of revamping its entire athletic program, and that the search committee considered both objective and subjective factors when weighing the candidates and making its recommendation. The court emphasized that Rickert was considered an average coach with questionable recruiting skills and that her teams had consistently performed worse as her tenure wore on. Moreover, any emphasis on another candidate's "youth" was not sufficient to prove intent to discriminate, especially when the committee ultimately ranked a third candidate who was similar in age to Rickert ahead of a younger applicant. Finally, the court found MLC conducted itself appropriately after the plaintiff lost her position as SAD. By telling her to conduct camps and tournaments, it helped ensure she was identified as a two-thirds time employee and could keep her benefits, and her substandard office arrangements had nothing to do with her age.

*Scott v. Haw. Dep't of Educ.*<sup>98</sup>

The Hawaii Department of Education and the principal, vice principal, and football coach at one of the state's public high schools moved for summary judgment on claims brought by one of school's former football players after he was kicked off the team for his role in a lunch-room brawl on campus and

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98. 2009 U.S. Dist. LEXIS 16884 (D. Haw. Mar. 5, 2009).

allegedly forced to complete the remainder of his fall school work from home. Dontae Scott was scheduled to graduate from high school at the end of that semester. At a meeting following the brawl, the participants, including the principal and vice principal, determined that Scott had committed a "Class B" offense under the state's administrative rules because he engaged in disorderly conduct by attempting to re-start the fight after it was broken up. Under the school's parent-student athletic handbook, all student-athletes who committed a "Class B" offense were automatically suspended from all school athletic activities for the duration of the applicable sport season. Although all of the school's football players who were involved in the brawl were told to stay home from a game the following evening, one accessory did play. However, the school did not have knowledge that the player was involved in the brawl until the following week. All three members of the football team involved with the brawl were eventually kicked off the team for the remainder of the season. Three of the seven students suspended from school for their roles in the incident were in special education, including Scott.

The court granted the defendant's motion on all of Scott's claims. It concluded that Scott's race discrimination claims were either unsubstantiated or barred by the Eleventh Amendment, noting that both states and state officials serving in their official capacities have constitutional immunity from lawsuits for money damages. The court also held that both his Rehabilitation Act and Individuals with Disabilities in Education Act (IDEA) claims were unsubstantiated, noting that he failed to exhaust his administrative remedies before bringing his IDEA claim. In assessing the merits of the IDEA claim, the court emphasized that Scott's request for a review of his punishment failed to describe the problem with the proposed discipline and that he was never actually barred from appealing his punishment under the state's administrative rules. Finally, the court found that Scott's claim for intentional infliction of emotional distress failed because he could not prove that the behavior of the principal, vice principal, or football coach was outrageous or that they acted with the malice required to bring suit against a non-judicial governmental official. It noted that the behavior of the individual defendants could only be outrageous if it was discriminatory and that it was clear Scott was not punished because of his race or disability.

*Solkey v. Fed. Way Sch. Dist.*<sup>99</sup>

A school district, three district employees, and three of the district's high school employees moved for summary judgment on claims brought by Terra

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99. 2009 U.S. Dist. LEXIS 43989 (W.D. Wash. May 26, 2009).

Solkey after the district failed to re-hire her as its high school girls basketball coach and allegedly retaliated against her for complaining about gender inequity. The high school principal claimed that he decided to re-open the hiring for all coaching positions to draw from a larger pool of potential coaches. In the past, Solkey had complained about gender inequity in the treatment of the high school's female athletes. After the district made its decision to hire another candidate, she continued to complain, but received negative comments in her performance evaluations that led to the high school recommending that she be placed in an alternative learning space for the upcoming school year.

The court granted the defendant's motion on all of Solkey's claims. After assessing her Fourteenth Amendment due process claim, the court held that Solkey did not have a property interest in the renewal of her one-year coaching contract under state law. After assessing her Title VII gender discrimination and retaliation claims and Title IX retaliation claim, the court concluded that she did not present evidence to show that the stated reasons for re-opening her position and hiring another candidate were mere pretexts for discrimination. In addition, she failed to show why the defendants were not entitled to qualified immunity on the Title VII claim. After assessing her First Amendment claim, the court held that there was no evidence suggesting that Solkey's initial complaints about gender inequity were the motivating factor behind the decision to re-open her position or hire a different coach and that her continued complaints did not result in an adverse employment action. It emphasized that her performance evaluations were still solid and that the high school's plan to place her in an alternative learning space never materialized. In addition, she failed to show why the defendants were not entitled to qualified immunity on the claim. Finally, the court found that Solkey's state law discrimination and retaliation claims fell with her federal claims and that there was no evidence to support her state law hostile work environment claim or her common law claim for wrongful termination in violation of public policy.

*Williams v. U.S. Tennis Ass'n*<sup>100</sup>

After a youth tennis player and her mother were given the opportunity to amend their complaint as *pro se* litigants, the United States Tennis Association (USTA), the USTA's Northern California branch, and a tennis club that hosted a USTA tournament once again moved to dismiss the federal race

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100. 2009 U.S. Dist. LEXIS 57663 (N.D. Cal. July 7, 2009), *aff'd on reh'g*, 2009 U.S. Dist. LEXIS 117640 (N.D. Cal. Dec. 17, 2009).

discrimination and state law claims brought for failing to respond appropriately to the plaintiffs' complaints about the actions of another player and her family following a match between the players. In addition to the claims arising out of the response to those complaints, the plaintiffs also alleged that the USTA entities created an unsafe environment at tournaments for African-Americans and arbitrarily enforced their rules and regulations when dealing with African-American members. The lawsuit was initiated after one of the plaintiff's tennis player's opponents allegedly called her derogatory names and threw an ice pack at her during a tournament match, then assaulted and threatened the plaintiffs with the help of mother the following day. The plaintiffs claimed that neither the USTA entities nor the club assisted them when the assault took place and that the defendants failed to provide adequate security during the event. In addition, they claimed that the defendants retaliated against them when they reported the incident between the players.

The court granted the motion in part and denied it in part. In throwing out the § 1981 race discrimination claim, the court emphasized that the plaintiffs failed to identify any facts indicating that the defendants' conduct impaired the contractual relationship between the parties. It noted that the plaintiffs could not show that any rights guaranteed to the plaintiffs under her USTA membership agreement were hindered by the defendants' actions in response to the altercation between the players. In dismissing the § 1982 claim, the court relied on similar reasoning, noting that the plaintiffs failed to allege any property interests that the defendants impaired with their conduct. Finally, in tackling the § 1985(3) conspiracy claim, the court found that the plaintiffs failed to show that the defendants conspired in their conduct or what they were conspiring to do. It noted that the allegation that the defendants acted similarly in response to the altercation between the players was insufficient to infer a conspiracy. Because it dismissed the race discrimination claims, the court refused to exercise supplement jurisdiction and rule on the plaintiffs' state law claims.

#### DRUG TESTING ISSUES

Although anti-doping rules that apply to athletes are promulgated and enforced internally within sports leagues and associations, drug testing in some sports is often conducted by state administrative bodies. Those bodies use the power given to them under state law to enact regulations that ensure the health and safety of participants. Although many of the legal issues tackled through the years have related to the regulation of boxing, the following cases address another sport that deals with often-perplexing doping

problems.

*Case v. N.Y. State Racing & Wagering Bd.*<sup>101</sup>

Horse racing trainer Timothy Case appealed the New York State Racing & Wagering Board's (RWB) decision to revoke his license after one of his horses tested positive for an excess level of carbon dioxide, the latest in a string of doping violations that he committed. In addition to the penalties prescribed by the doping rules, the RWB's regulations included a provision allowing it to sanction trainers in any manner for activities inconsistent with the best interests of horse racing. The appellate court affirmed, holding that there was substantial evidence to support the RWB's determination that the test results were properly obtained and that the revocation was not a shockingly disproportionate penalty based on Case's history of violations.

*P'Pool v. Ind. Horse Racing Comm'n*<sup>102</sup>

Horse racing trainer Mark P'Pool appealed a trial court's judgment affirming the Indiana Horse Racing Commission's (IHRC) decision to impose a six-year suspension and a \$30,000 fine upon him for violating IHRC rules when several of his horses tested positive for elevated levels of an anti-inflammatory medication at a 2006 meet and for making false and misleading statements to the IHRC executive director when he was investigating the use of that drug among trainers. The IHRC rules prohibited the medication from being administered to a horse within one day of a race; drug tests indicating the medication's presence in urine or blood at greater than specified levels would indicate whether it was used within that period. After being informed five of the P'Pool's horses had tested positive, the executive director interviewed P'Pool as part of his investigation, but did not mention the results of the tests. When the director queried whether P'Pool had administered any drugs to any of his horses at the meet, the trainer failed to mention his use of the anti-inflammatory medication. When asked to forward medication records for all of the horses he trained that competed in the meet, P'Pool complied, but those records also failed to mention the use of the drug. After being notified that two more of P'Pool's horses had tested positive, the executive director conducted another interview, this time mentioning that one of the trainer's horses had tested positive and asking for an explanation of the result. P'Pool claimed that he used the medication as part of a "leg paint," and that he bought the pre-made concoction from veterinarians. However, he failed to identify

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101. 877 N.Y.S.2d 526 (App. Div. 2009).

102. 916 N.E.2d 668 (Ind. Ct. App. 2009).

any of the doctors who had sold him the paint. Later, P'Pool provided two recipes for making the paint, but a study commissioned by the IHRC based on those recipes indicated that the anti-inflammatory would have been undetectable. Therefore, he was charged with administering the drug during the prohibited period and making false statements to the IHRC. Just before his disciplinary hearing in front of the IHRC racing judges, three additional positive tests were announced, bringing the total number of violations to eleven. The racing judges imposed two sixty-day suspensions and \$2,000 in fines, and referred the charges to the IHRC for additional disciplinary action. The executive director then proposed the sanctions at issue, and P'Pool appealed to an administrative law judge (ALJ). P'Pool indicated he would call four veterinarians as experts on his preliminary witness list, but when those doctors were contacted by the IHRC for depositions, two indicated that they were unaware that they were expected to testify. The IHRC moved to exclude the listed veterinarians as witnesses due to the trainer's failure to cooperate in discovery, and the ALJ granted the motion. Following a hearing, the ALJ recommended that the IHRC adopt the proposed sanctions. Shortly afterwards, the IHRC issued an order formally imposing them.

The appellate court affirmed, holding P'Pool was not denied due process during the IHRC investigatory and disciplinary proceedings. First, the court found that the IHRC's failure to provide prompt notice of the positive tests was not arbitrary and capricious, noting that the delay was entirely justifiable based on the IHRC's need to police the sport. Second, the court determined the sanctions were not arbitrary and capricious because state law gave the IHRC the power to impose penalties above and beyond those imposed by the racing judges. The court noted the IHRC could have imposed a maximum fine of \$55,000 under the circumstances and stripped P'Pool's license, especially in light of the false and misleading statements he made to the executive director. In addition, the sanctions were consistent with those imposed for similar violations of the medication rules. Third, the court found the ALJ did not abuse his discretion in preventing P'Pool's proposed expert witnesses from testifying, emphasizing that state law gave the ALJ broad discretion to impose sanctions when the discovery process is abused. Finally, the court held the evidence was sufficient to support the IHRC's finding that P'Pool made false and misleading statements, especially in light of the results of the commissioned study on his "leg paint" recipes.

*Vaders v. Pa. State Horse Racing Comm'n*<sup>103</sup>

Horse racing trainer Jayne Vaders appealed the Pennsylvania State Horse Racing Commission's (HRC) decision to revoke her license after one of her horses tested positive for a banned substance. Vaders was warned following a previous positive test that another violation would cost her the ability to participate in the sport. Prior to her hearing in front of the HRC, Vaders requested test documents that indicated the concentration levels of the substance that was found in the horse, but the Board of Stewards denied her request. She was the first person to have her license revoked under the HRC's regulations, which state that trainers should be banned following a second offense. Vaders had committed at least five previous violations before the HRC took action.

The appellate court affirmed, holding that the HRC did not violate the Vaders's due process rights and the decision to revoke her license was not the result of selective enforcement of the applicable regulations. In assessing the due process claim, the court concluded that the documents requested by Vaders would not help her rebut the presumption that there was a banned substance in her horse's body. It noted that there was no provision in the regulations that allowed licensees to mitigate their liability by pointing to the concentration of the drug in a horse's system. The court also pointed out that Vaders could have obtained the documents through the subpoena process provided by the state's administrative rules. In assessing whether the HRC was selectively enforcing its regulations, the court noted that Vaders had been warned after her previous positive test and could have had her license revoked after three of her earlier violations. It also emphasized that no other trainer had broke the HRC's anti-doping rules as many times as Vaders had.

## EDUCATION LAW

The rules adopted by high schools, school districts, high school athletic associations, universities, and the NCAA create a complex body of law governing the rights and responsibilities of athletes. Although many aspects of those regulations have been challenged on constitutional grounds, that route is not an option unless the entity that has enacted them is deemed a state actor. However, courts have been willing to assess those rules under the law of private associations, which requires non-governmental bodies to provide basic due process, follow their own rules, and avoid arbitrary and capricious behavior. While some of the following cases involve decisions that implicate constitutional or tort law, most of them assess challenges brought by athletes

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103. 964 A.2d 56 (Pa. Commw. Ct. 2009).

and local educational entities under the aforementioned standard.

*Cape Henlopen Sch. Dist. v. Del. Interscholastic Athletic Ass'n*<sup>104</sup>

The Delaware Board of Education (BOE) and the Delaware Interscholastic Athletic Association (DIAA) moved to dismiss a school district's appeal of the BOE's decision to uphold the DIAA's denial of the district's request to waive penalties associated with a high school's use of an ineligible basketball player. The court granted the motion, holding that the BOE's decision was not subject to appeal under state law. The court noted that the Administrative Procedures Act appeared to provide for an appeal, but that it conflicted with a new state law that specifically sets up a process for dealing with disputes over the rules and regulations promulgated by the BOE. The law gave individuals the ability to appeal a DIAA decision to the BOE, but stated that the BOE's decision was final.

*Dziewa v. Pa. Interscholastic Athletic Ass'n*<sup>105</sup>

The parents of a high school wrestler moved for a preliminary injunction in a lawsuit that they brought against the Pennsylvania Interscholastic Athletic Association (PIAA) after it allegedly violated the federal constitution and acted arbitrary and capricious by ruling that the wrestler was ineligible to immediately participate in varsity athletics following his transfer to a new school. The PIAA determined that the wrestler had transferred due to problems with his previous coach and the desire to compete for a higher-profile program, and the association's rules dictated that any student-athlete who transferred for athletic reasons must sit out for one year. The wrestler's parents claimed that the transfer was made only after they separated and their son decided to move into a new home purchased by his father. They also claimed that the PIAA violated their privacy rights by punishing their son for their failure to disclose their separation in their waiver request, and interfered with their decision to select a school best suited for him. Finally, they claimed that the PIAA violated their son's equal protection rights because it treated students who transferred due to parental separations differently than students who transferred for other reasons.

The court denied the motion, holding that the PIAA did not likely violate the wrestler's parents' constitutional rights and that ineligibility for participation in interscholastic athletic competitions alone does not constitute irreparable harm. In assessing the privacy claim, the court noted that

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104. 2009 Del. Super. LEXIS 35 (Del. Super. Ct. Jan. 28, 2009).

105. 2009 U.S. Dist. LEXIS 3062 (E.D. Pa. Jan. 16, 2009).



protection from disclosing personal matters only extends to particularly sensitive information, and that the PIAA did not prevent the wrestler's parents from choosing a particular school for their son. In assessing the equal protection claim, the court found rational basis review was appropriate and concluded that there were facially legitimate reasons for the alleged classification. In assessing the state law claims, the court noted that the ruling may have been arbitrary and capricious, but found that the wrestler had other means of receiving exposure that could lead to a college scholarship.

*Heike v. Guevara*<sup>106</sup>

The Central Michigan University (CMU) Board of Trustees, CMU women's basketball coach Sue Guevara, CMU Athletic Director Dave Heeke, and a CMU financial aid officer moved to dismiss claims brought by a former CMU women's basketball player after she was kicked off the team by Guevara and stripped of her athletic scholarship at the end of her sophomore season. Guevara's predecessor allegedly convinced the plaintiff to accept CMU's scholarship offer by orally guaranteeing her an education. However, the plaintiff also received a letter from Heeke's predecessor stating that the renewal of her yearly scholarship was subject to the conditions listed in the Mid-American Conference Letter of Intent and National Letter of Intent, which she subsequently signed. The plaintiff had a relatively smooth freshman year until Guevara took over as the head coach at the end of the basketball season. Guevara had been fired as the coach of the University of Michigan (UM) three years earlier, but it was not clear whether CMU investigated the reasons behind that decision. Six players left the program during Guevara's seven-year tenure at UM, all due to poor relationships with the coach. That pattern apparently continued at CMU. Upon arriving, Guevara allegedly confronted the plaintiff about wearing make-up, and over the next eleven months, their relationship soured. According to the plaintiff, Guevara harassed her, singled her out for disparate treatment, and tried to force her to transfer, based in part because the plaintiff was heterosexual. Guevara's actions also caused the plaintiff to suffer severe emotional distress, and at one point it manifested in a medical condition. When the plaintiff appealed the decision to strip her scholarship to a university committee, Guevara claimed that she was not meeting the program's expectations, even though the coach had never informed her of her alleged deficiencies.

The court granted the defendant's motion in part and allowed the plaintiff

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106. 654 F. Supp. 2d 658 (E.D. Mich. 2009), *motion to dismiss remaining claims granted in part and denied in part*, 2009 U.S. Dist. LEXIS 103600 (E.D. Mich. Nov. 6, 2009).

to submit supplemental briefs in an attempt to save two of her claims. It never assessed the plaintiff's Fourteenth Amendment claims against CMU, concluding that the university enjoyed Eleventh Amendment immunity from suit. The court emphasized that Congress only abrogated that immunity as to claims brought under federal statutes prohibiting discrimination, not claims brought under constitutional or state law. It also never assessed the Fourteenth Amendment "official capacity" claims against the individual defendants, concluding that the coach, athletic director, and financial aid officer also enjoyed Eleventh Amendment immunity. The court emphasized that all "official capacity" claims based on state law or based on federal law and seeking monetary damages were barred in order to protect the principles of federalism. But even without immunity, the court found that all of the above claims would still be barred because a state and its employees are not considered "persons" under § 1983. In assessing the negligent hiring and negligent supervision claims brought against Heeke, the court concluded that the athletic director would enjoy governmental immunity under state law based on the current complaint. However, it gave the plaintiff leave to submit a supplemental brief to explain how Heeke's conduct in hiring and supervising Guevara amounted to gross negligence. Finally, in assessing the defamation claims brought against all of the individual defendants, the court emphasized that the plaintiff failed to establish defamation *per se* under state law and that her failure to allege reputational harm or monetary damages would normally be fatal to her claim. It also found that the plaintiff failed to cite the alleged defamatory statements made by the athletic director and the financial aid director. Nevertheless, the court allowed the plaintiff to submit a supplemental brief that identified special damages and the comments made by those individuals. It also ordered the plaintiff to respond to the defendants' argument that all of their statements about her were either privileged or mere opinions.

In a subsequent decision assessing the plaintiff's supplemental brief, the court granted the remainder of the motion to dismiss in part and denied it in part. The court concluded that (1) Heeke was entitled to governmental immunity from any liability in hiring or supervising Guevara because the plaintiff could not demonstrate that his conduct amount to gross negligence, and (2) Heeke's defamation claims against Heeke and the university's financial aid officer were still not plead with required specificity. However, the court refused to dismiss the plaintiff's defamation claim against Guevara, emphasizing that there was insufficient evidence to determine whether or not her testimony during the university committee hearing constituted opinions or statements of fact. The court noted that Guevara could not be shielded by the "absolute immunity privilege," which protects only statements made in a

“judicial function.” It found that the hearing did not constitute a “judicial function” because Michigan courts had demonstrated a reluctance to extend the privilege beyond a traditional understanding of a judicial proceeding.

*Ind. High Sch. Athletic Ass’n v. Schafer*<sup>107</sup>

The Indiana High School Athletic Association (IHSAA) appealed a trial court’s decision to award attorneys’ fees to a former high school basketball player and his father after they were successful in obtaining a declaratory judgment that the application of certain IHSAA rules to the player’s circumstances was unconstitutional and an injunction that prevented the IHSAA from prohibiting the player from participating in interscholastic sports beyond his first eight semesters of high school. The IHSAA had refused the player’s request for additional eligibility under one rule, but affirmed on appeal under a different rule. Then, when the player challenged the decision in court, the IHSAA argued he was ineligible under a third rule. After finding the rules unconstitutional as applied, the court allowed the player to recover fees for over 490 hours of service because the IHSAA continued to litigate frivolous defenses well after the player had already graduated. The appellate court reversed and remanded, emphasizing that it was concerned that the IHSAA was discouraging parents and student-athletes from challenging a denial of eligibility, but concluding that the trial court needed to further explain its decision to award attorneys’ fees. The court noted that the special findings of fact requested by the plaintiffs failed to specify what IHSAA litigation tactics were problematic; instead, the trial court had couched its findings in conclusory statements. The appellate court noted that just because the entire record provided support for awarding attorneys’ fees did not allow it to ignore findings that did not support that judgment.

*Ind. High Sch. Athletic Ass’n v. Watson*<sup>108</sup>

The Indiana High School Athletic Association (IHSAA) concluded that (1) the IHSAA Review Committee acted arbitrary and capricious when it ruled high school basketball player Jasmine Watson ineligible to play her senior season due for violating IHSAA rules and (2) enjoined the IHSAA from enforcing its decision or applying its restitution rule against the school that she attended. During her freshman, sophomore, and junior years, Watson lived and attended school in Elkhart, Indiana, where she lived with her single mother and her three minor siblings in the family’s six-bedroom house.

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107. 913 N.E.2d 789 (Ind. Ct. App. 2009).

108. 913 N.E.2d 741 (Ind. Ct. App. 2009).

However, she transferred schools during the summer prior to her senior year when her mother decided to move the family to South Bend. Several factors played a role in that decision. Although her mother was still employed at a plant in Elkhart, her mother's salary had been cut a year earlier due to a drastic reduction in her work hours. As a result, she was unable to make the mortgage payments on the family home, and her lender started foreclosure proceedings. She would have been able to keep the house until November of Watson's senior year, but began looking for another home; however, she wanted to avoid the risk that her children would have to change schools in the middle of the school year. She attempted to locate another suitable place to live in Elkhart, but the houses that she qualified to rent were either too expensive, too small, or located in unsafe areas. Ultimately, she decided to relocate the family to her hometown, where she not only found a large home at an affordable rate, but support from her extended family that lived in the area.

Prior to the move, the head coach at Watson's old school in Elkhart assisted Watson's mother in her attempt to find a place to rent in town. At one point, he even convinced a homeowner to waive a security deposit and offer his property at a reduced rate. In the event the family moved out of town, he offered to provide transportation to Watson so that she could still attend school in Elkhart. An assistant coach also invited Watson to live with her for the year. Following the transfer, Watson sought immediate eligibility to play basketball at her new school based on the family's change in residence. However, under IHSA rules, a student who transfers for primarily athletic reasons or as the result of undue influence must sit out a year, even if the student's family has changed residences. Watson's old school in Elkhart refused to approve her request because the head coach believed the transfer was motivated by athletic reasons and that she had been recruited to South Bend. His beliefs were based on a comment by Watson's mother, who told him that Watson was leaving, in part, because of the player's disappointment with the Elkhart program. The coach also alleged that Watson's grandmother had told other individuals the previous spring that the family was looking for another school for Watson to attend. Several other witnesses claimed that they had heard that the coaches at Watson's new school were recruiting her during this time. The IHSA Review Committee determined Watson's move violated the association's transfer rule and/or undue influence rule.

The appellate court affirmed, holding there was no error in granting the injunction because Watson was likely to succeed on the merits of her claim when the IHSA's ruling on her eligibility disregarded the basic facts and circumstances surrounding her transfer and the failure to prohibit the IHSA from taking action against her new school would render the trial court's decision powerless. As a preliminary matter, the appellate court determined

that the action was not moot, even though Watson's eligibility was no longer an issue, because the IHSAA could still apply its restitution rule in the event of a reversal and the case involved an issue that was of great public interest and likely to recur. In assessing the ruling on Watson's eligibility, the court emphasized that the IHSAA placed too much emphasis on disputed, unsubstantiated hearsay statements and disregarded the transportation problems that Watson's family would have faced by continuing to send her to school in Elkhart. But more importantly, the court found there was no way that the IHSAA could establish that the transfer occurred for primarily athletic reasons, even if Watson's basketball future did play a role. The court found that conclusion would ignore the evidence that Watson's mother made a decision in the best interests of all her children, especially in light of her financial problems. In addition, the court admonished the IHSAA for ignoring the efforts of the Elkhart coaches to keep Watson in town and for questioning her mother's inability to find a suitable replacement home. It emphasized that the coaches' efforts were also clearly illegal under the IHSAA undue influence rule, and that the family's decision to decline those favors could not be used as a basis for finding an athletically-motivated transfer without resulting in an inconsistent application of the rule. In affirming the scope of the injunction, the court emphasized that the IHSAA acted arbitrarily and capriciously in determining that the coach at Watson's new school violated the undue influence rule. It noted that the allegations against the coach would not amount to undue influence even if they were true, and that the IHSAA's decision to make that determination in the middle of an eligibility ruling made it proper to consider when entering the injunction.

*Mather v. Loveland City Sch. Dist. Bd. of Educ.*<sup>109</sup>

The Loveland City School District Board of Education (BOE) appealed a trial court's decision to grant that prevented the BOE from suspending a high school football player for part of the high school football season after he was arrested for underage drinking and possession of alcohol. Both the player and his father had signed his high school's athletic code, which prohibited the use or possession of alcohol and specified penalties for violating that rule. The appellate court reversed, holding that the trial court erred in exercising jurisdiction and determining that the school illegally acquired the information used to suspend the player. The court found that the player had no statutory right to an appeal because the suspension only related to extracurricular activities, and no constitutional right to an appeal because he had no property

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109. 908 N.E.2d 1039 (Ohio Ct. App. 2009).

interest in participating in interscholastic athletics. After assessing whether the school illegally acquired the information used to suspend the athlete, the court concluded that state law did not make juvenile arrest records confidential; thus, an in-school law enforcement officer was allowed to tell the school's athletic director about the incident.

*Morgan v. Okla. Secondary Sch. Activities Ass'n*<sup>110</sup>

The Oklahoma Secondary School Activities Association (OSSAA) appealed a trial court's decision to grant an injunction that prevented the OSSAA from enforcing its transfer rule and declaring a high school basketball player ineligible to compete in interscholastic athletics for one year. The transfer occurred after the player's parents were barred from attending athletic contests at her former high school when her father got into an altercation with a member of the school board following a game. The player sought a hardship waiver in order to become immediately eligible at her new high school, but the OSSAA denied her application. The Oklahoma Supreme Court reversed, holding that the trial court erred in granting the injunction because participation in interscholastic athletics was a privilege subject to the OSSAA eligibility rules and there was no evidence they were applied in an arbitrary or capricious manner.

*Oliver v. Nat'l Collegiate Athletic Ass'n*<sup>111</sup>

Former Oklahoma State University baseball player Andrew Oliver moved for a judgment declaring that two of the NCAA's bylaws violated Ohio law and for a permanent injunction that would prevent the association from enforcing them. The NCAA suspended Oliver from participating in intercollegiate athletics in May 2008 after discovering that he had allowed his former attorneys to help him attempt to negotiate a professional contract when he was drafted out of high school. The first bylaw at issue prohibited current and prospective student-athletes from hiring agents to directly negotiate with professional teams. The second bylaw was the NCAA's restitution rule, which allowed the association to vacate the accomplishments of its member schools' teams of their records if they allowed a student-athlete to compete under a court order and that person was later deemed to be ineligible.

The court granted both of Oliver's motions. It held the first bylaw was arbitrary and capricious and violated the public policy of the state of Ohio because it was virtually impossible to enforce in an even manner and

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110. 207 P.3d 362 (Okla. 2009).

111. 920 N.E.2d 203 (Ohio Ct. Com. Pl. 2009).

attempted to dictate where, when, and how attorneys could represent their clients. The court noted that NCAA rules allowed student-athletes to hire attorneys and that it would be difficult for those athletes to assess when an attorney was acting in an agent's role. It also emphasized that no entity other than the state itself could regulate attorney conduct. But most importantly, the court found that the bylaw failed to serve its intended purpose: preserving the line of demarcation between amateurism and professionalism. The court also held the restitution Rule was arbitrary and capricious because it interfered with the power of the judicial system by forcing member schools to disregard court orders and sit student-athletes who had been permitted to participate. The court found that the rule was discouraging student-athletes from using the judicial system to vindicate their rights.

*Ulliman v. Ohio High Sch. Athletic Ass'n*<sup>112</sup>

The Ohio High School Athletic Association (OHSAA) appealed a trial court's decision to preliminarily enjoin the OHSAA from enforcing its transfer rule against high school football player Benjamin Ulliman to prohibit him from participating in interscholastic sports during his senior year and from taking adverse action against his school for allowing him to compete. Ulliman had previously transferred to a new school during the first semester of his sophomore year. That school was located in the district where his parents resided, but he was ineligible to play sports through his junior year due to poor grades. Following his junior year, he moved to his grandparents' home in another district and made the transfer at issue in this case. According to the OHSAA, its bylaws barred Ulliman from playing for one year from the date of his second transfer unless he could prove there was a change in custody to an individual living in the new school's district. However, the transfer rule only states that an athlete is considered to have transferred whenever he changes from the school he attended as a freshman to any other school. Based on that language, the trial court determined the bylaw did not apply to Ulliman, who was not transferring from the school he attended as a freshman.

The appellate court vacated the injunction, holding Ulliman could not demonstrate a likelihood of success on the merits when the transfer rule applied to his case and the OHSAA did not act arbitrary or capricious in enforcing that bylaw against him. After determining the appeal was not moot because the OHSAA could still penalize the school for allowing the athlete to participate, the court found that the OHSAA's interpretation of the bylaw's language was not mistaken. It noted that a private association's interpretation

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112. 919 N.E. 2d 763 (Ohio Ct. App. 2009).

of its own rules is entitled to deference—especially when they appear ambiguous—and emphasized that the trial court’s analysis failed to take into account the bylaw’s purpose and listed exceptions. The court recognized that it would be impossible to prevent athletes from shopping for schools if the rule only applied to initial transfers, and that the OHSAA would not have needed to adopt several of its exceptions if that interpretation were correct. In assessing whether the OHSAA acted arbitrary in applying the rule in this case, the court noted that the association had consistently barred other athletes from participating in similar situations. More importantly, it found the fact that the “change in custody” exception was unavailable to Ulliman did not indicate the exception was improperly adopted or irrationally based. Although the athlete was eighteen years old at the time of transfer, the OHSAA was not required to anticipate every situation in its rules.

#### EMPLOYMENT LAW

Employment law governs a variety of disputes that arise between sports industry professionals and their employers that are not covered by collective bargaining agreements or statutes prohibiting discrimination. Professional athletes often rely on the unique mechanisms found within this body of law to protect themselves from financial ruin, especially when they suffer career-threatening injuries. Coaches can also use employment laws to protect themselves from liability for their tortious conduct. The following cases provide insight into how workers’ compensation insurance and other state laws have streamlined the process of resolving employment issues.

##### *Eaton v. Football Nw., LLC*<sup>113</sup>

Former NFL player Chad Eaton appealed a trial court’s judgment that affirmed an administrative order denying his request to re-open his first workers’ compensation claim against the Seattle Seahawks and vacated another order granting his request to re-open his second claim against the team. Eaton joined the Seahawks in 2001 after playing for the New England Patriots for six seasons. During his final season in New England, he sustained a right knee injury that required surgery, but he was deemed fit to play the following year. His first season in Seattle was relatively uneventful, but he reinjured his knee in preseason camp prior to his second year. Shortly afterwards, he filed a workers’ compensation claim, and the Seahawks were ordered to pay him a permanent partial disability award. The following spring, he sustained yet another right knee injury during minicamp, causing

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113. 2009 Wash. App. LEXIS 2627 (Wash. Ct. App. Oct. 19, 2009).



him to miss the entire 2003 season. He filed a second workers' compensation claim, and benefits were paid once again. But his knee continued to cause problems. Including the surgery conducted following his latest injury, Eaton underwent five operations on his right knee between April 2003 and February 2004. His second claim was finally closed in July 2004 without a permanent disability award. Eaton would play nine games for the Dallas Cowboys that fall before retiring. In March 2005, he sought to re-open either of the claims he filed against the Seahawks, hoping to get additional treatment on his knee.

The appellate court affirmed the judgment on the first workers' compensation claim, but vacated the judgment on the second claim and remanded for reconsideration. Assessing the second claim first, the court found that the trial court's findings and conclusions of law were too unclear to dismiss Eaton's appeal. It noted that the condition of his knee had been characterized as representing a "continuum" of his pro football career, which suggested that his April 2003 injury was the result of an occupational disease. The court found this characterization problematic when there was no evidence that the department managing the claims or the Seahawks had considered the "disease" theory and the administrative appeals judge had explicitly labeled it an industrial injury. The court also noted that Eaton's brief tenure with the Cowboys was identified as his "last injurious exposure" even though there were doubts as to whether that exposure would prevent his claim from being re-opened. It pointed out that the Washington Supreme Court had held that an employee's previous employer could not be relieved from liability if his last employer was located in another state, regardless if the employee's latest work exposed him to dangerous conditions. In affirming the judgment on Eaton's first claim, the court held that the trial court's findings were supported by substantial evidence, emphasizing that there was no proximate cause between the earlier injury and the later aggravation.

*Esposito-Cogan v. East Haven Bd. of Educ.*<sup>114</sup>

The East Haven Board of Education (BOE) moved for summary judgment on Eva Esposito-Cogan's claim that the BOE violated her Fourteenth Amendment rights when it voted not to renew her contract to coach the town's high school girls' volleyball team during a June 2005 meeting. A state law required any board that declined to renew the contract of a coach who had served in that same position for at least three consecutive years to inform that coach of the decision within ninety days of end of the sports season covered by the coach's contract. The high school girls' volleyball season had ended

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114. 2009 U.S. Dist. LEXIS 28994 (D. Conn. Mar. 30, 2009).

the previous November. Esposito-Cogan appealed the BOE's decision and her contract was renewed two weeks later. However, she was placed on probationary status due to the complaints about her performance.

The court granted the motion, holding that Esposito-Cogan could not establish that her procedural due process rights had been violated. First, it determined that she did not have a protected property interest in the renewal of her coaching contract. Although the BOE clearly violated the state's notice requirement, its actions did not guarantee to Esposito-Cogan the right to continued employment as the volleyball coach. Second, the court concluded that she was not actually deprived of any tangible benefits during the two-week period when her appeal was pending, and that the state law implied that coaches could be given any number of designations following their yearly evaluations. The court also determined that Esposito-Cogan was not deprived of a protected liberty interest, even if the BOE's chairman and another BOE member made false and malicious public statements about her during the June meeting. Although they may have hurt Esposito-Cogan's feelings, she did not suffer any loss in benefits when they were made.

*Farquhar v. New Orleans Saints*<sup>115</sup>

Former professional football player John Farquhar appealed a workers' compensation court's decision to award him only \$43,000 plus interest in back supplemental earnings benefits after he suffered a career-ending knee injury while employed by the New Orleans Saints prior to the 1999 NFL season. Farquhar had signed a one-year deal that May and the Saints chose to pay him his entire contract amount despite his failure to make the active roster. Louisiana law provided that employees were entitled to supplemental earnings benefits for up to ten years as long as their subsequent earnings did not exceed ninety percent of their average weekly wage prior to an accident. Farquhar's subsequent earnings did not exceed the ninety percent threshold until July 2002, 144 weeks after the team released him.

The appellate court affirmed, holding that there was no error in determining the amount of the award. The court found Farquhar's average weekly wage was correctly calculated and that the team was entitled to a twenty-five-week credit against paying the benefits under the NFL Collective Bargaining Agreement (CBA). In assessing Farquhar's average weekly wage, the court emphasized that the wage had to be based on his actual earnings during the preseason, not on his contract amount. Therefore, he was only entitled to approximately \$53,000 in back benefits based on the 144-week

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115. 16 So. 3d 404 (La. Ct. App. 2009).

period. In addition, the court held that he was not entitled to full interest on his claim because it was stayed while he challenged the constitutionality of one of the state's workers' compensation laws, which was subsequently repealed. The court subtracted \$9,000 under the CBA, which allowed a team to take a credit if it paid a player's full salary even though he did not make the active roster.

*Ledford v. New Orleans Saints*<sup>116</sup>

Former professional football player Dwayne Ledford appealed a workers' compensation court's decision to deny him supplemental earnings benefits and reimbursement for his medical expenses after he was released by the New Orleans Saints prior to the 2006 NFL season and then chose to remove hardware that was placed in his one of his fingers to stabilize a fracture that he had sustained during spring workouts, just after he had signed a two-year contract with the team. The finger fracture had completely healed by the time he was released that summer. Louisiana law provided that employees were entitled to supplemental earnings benefits for up to ten years as long as their subsequent earnings did not exceed ninety percent of their average weekly wage prior to an accident. After being released, Ledford was offered positions with two other teams at a salary of up to \$100,000, but he chose to decline those offers without ever trying out. He began a new career as a coach six months later.

The appellate court affirmed, holding there was no error in the determination that Ledford was not entitled to benefits or reimbursement for his medical expenses because he was almost immediately able to earn ninety percent of his average weekly wage prior to the accident and it was not medically necessary to remove the hardware from his finger. In calculating Ledford's average weekly wage, the court emphasized that the wage had to be based on his actual earnings during the preseason, not his contract amount. Therefore, it found that he made only \$527 per week with the Saints, which was far less than the offers that he later received from other teams. The court also noted that his coaching salary started at \$2,000 per month and had escalated to \$5,000 per month by 2008.

*Matyas v. Bd. of Educ.*<sup>117</sup>

A school district board of education (BOE) appealed a trial court's decision to overturn the BOE's ruling that rejected the petition of school

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116. 10 So. 3d 866 (La. Ct. App. 2009).

117. 880 N.Y.S.2d 378 (App. Div. 2009).

district baseball coach John Matyas for a defense and indemnification from potential liability in a malicious prosecution suit brought by one of his player's parents after the parent was acquitted of a criminal charge based on Matyas's statement to police following an altercation with that parent during a game. Although Matyas admitted that he made the statement without first consulting the BOE, there was a dispute as to whether he had been informed that the BOE did not want him to press charges against the parent. Matyas also claimed that he would have withdrawn the charge if he had been told not to pursue it. The appellate court reversed, holding that the trial court failed to apply the proper standard of review to the BOE's determination when it found Matyas was acting within the scope of his duties when he made the statement. The court emphasized that the BOE's ruling had to be upheld unless it was arbitrary and capricious and remanded the case to resolve questions of fact as to whether the ruling had a rational basis.

*Meier v. New Orleans Saints*<sup>118</sup>

Former professional football player Shadley Meier appealed a workers' compensation court's decision to deny him supplemental earnings benefits after he suffered a serious knee injury while in training camp with the New Orleans Saints prior to the 2005 NFL season and was subsequently released in the spring of 2006. Maier signed a two-year contract with the team in the spring of 2005. He earned approximately \$554,000 over the first year of the deal and just over \$66,000 prior to being released in year two. Louisiana law provides that employees are entitled to supplemental earnings benefits for up to ten years as long as their subsequent earnings do not exceed ninety percent of their average weekly wage prior to an accident. Maier's subsequent earnings had not exceeded the ninety percent threshold.

The appellate court reversed, holding that the trial court erred in determining that Maier re-injured his knee in 2006 and that only the wages that he earned in a minicamp prior to being released could be used to calculate his benefits. The court noted that Meier's knee problems could be traced back to the previous summer; thus, his earnings under the first year of the contract should have been used to calculate his benefits. The court also emphasized that his contract covered more than just the football season; therefore, his average weekly wage had to be based on the amount that he earned over the entire first year, not just his prorated earnings prior to the injury. After assessing Meier's average weekly wage, the court determined that he was entitled to over \$34,000 in back benefits, based on a seventy-five-week period.

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118. 6 So. 3d 944 (La. Ct. App. 2009).

It noted that the team was entitled to a twenty-five-week credit against paying the benefits under the NFL Collective Bargaining Agreement because the team paid Meier's full salary for the 2005 season even though he did not make the active roster.

*Reece v. Event Staffing & Accident Fund Ins. Co. of Am.*<sup>119</sup>

A former Arena Football League team—the Grand Rapids Rampage—and its insurer appealed a workers' compensation commission's decision in favor of former Rampage player Travis Reece on his claim for disability benefits for a shoulder condition that developed as a result of multiple tackle-related injuries. Reece also appealed the commission's decision to include the compensation that he was paid for participating in training camp and the time that he attended camp in determining his average weekly wage. As part of its award, the commission found that Reece was entitled to wage-loss benefits during the off-season. The appellate court affirmed in part and reversed in part, holding the commission's decision to include training camp time and compensation in determining Reece's average weekly wage was appropriate, but it erred in granting off-season wage-loss benefits. The court emphasized that Reece would not have earned wages playing professional football or engaging in other work for the team during the off-season, whether he was injured or not.

GENDER EQUITY LAW

Ever since the Office of Civil Rights issued its 1979 Title IX Policy Interpretation, entities that receive federal funding have faced more pressure to place female athletes on an equal footing with their male counterparts. Under the Policy Interpretation, public schools were placed on notice that they had to provide equal participation opportunities to both men and women, and the changes made have led to even more scrutiny of other aspects of athletic programs. However, female athletes are still being treated as substandard in educational institutions throughout the country. The following cases demonstrate Title IX's impact on athletic opportunities for females, as well as its retaliation provisions and public policy implications.

*Atkinson v. Lafayette Coll.*<sup>120</sup>

Lafayette College moved for summary judgment on a Title IX retaliation

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119. 2009 Mich. App. LEXIS 1622 (Mich. Ct. App. July 30, 2009).

120. 653 F. Supp. 2d 581 (E.D. Pa. 2009).

claim brought against it by its former athletic director Eve Atkinson, after the school fired her following her decade-long crusade to bring it into compliance with the law's gender equity mandates. Shortly after she was hired, Atkinson began complaining that the school's athletic program did not comply with Title IX, and her recommendations led the school to commission a self-study to evaluate its efforts to achieve gender equity. That study suggested several improvements, including those outlined in a gender equity plan developed by Atkinson. It was eventually submitted to the NCAA, and the school was provisionally certified as compliant with Title IX less than one year later. However, Atkinson continued to argue with the school's administration about the lack of funds to expand women's programs. The administration told her it was unwilling to allocate any more funds to athletics and that she needed to work within the department's current budget to achieve and maintain compliance. As a result, Atkinson submitted a plan to eliminate four varsity sports. But rather than approve her suggestions, the school decided to conduct a study on the entire athletic department to determine whether it should drop to Division III. Atkinson opposed that type of change and called a meeting with the school's student-athletes to ask for their support and assistance in advocating her stance. The completed study recommended staying in Division I and conducting another capital campaign for athletics. That campaign allowed Atkinson to hire three new coaches in women's sports and put the school in full compliance with Title IX. However, just seven months later, the school fired her. Its president claimed the athletic department needed new leadership, but he never cited Atkinson's specific deficiencies when she asked for them. Later, he indicated that concerns over her management style and poor judgment were the biggest reasons that the school decided to make the change.

The court granted the school's motion, holding that Atkinson failed to establish a *prima facie* case of retaliation or show that the school's alleged reasons for firing her were a mere pretext for discrimination. After assessing the elements of a *prima facie* case, the court concluded that Atkinson could not prove that she had engaged in "protected activity" or that there was a link between the alleged activity and the school's decision to terminate her. In discussing the "protected activity" element, the court emphasized that Atkinson never engaged in "protected activity" that was outside the scope of her employment, which included ensuring Title IX compliance. It noted that her advocacy was not adverse to the school's interest, but exactly what she was hired to do, and that it never opposed her efforts. Moreover, Atkinson's arguments following NCAA certification only dealt with extra funding and the school's divisional status, not shortcomings related to Title IX. In discussing the "causation" element, the court determined that there was no evidence that

the school terminated Atkinson due to her views on Title IX, emphasizing that she had been financially rewarded for her efforts in bringing it into compliance. In addition, the court found a complete lack of temporal proximity between Atkinson's alleged Title IX complaints and the date of her termination. It noted that her advocacy had ended at least seven months earlier, and that, based on her long history of complaints, the school probably would not have waited a decade to fire her if it really opposed her views. In fact, Atkinson admitted that she had no idea why she was terminated when the school made its decision. Finally, after considering whether the school's stated reasons for firing Atkinson were a pretext, the court concluded that the athletic director offered an adequate rebuttal, emphasizing (1) that the school's post hoc explanation could not *ipso facto* create a pretext; (2) that Atkinson had failed to depose individuals who had spoken with the school about her leadership and management skills or would be willing to vouch for her skills; and (3) that the school's criticism of her meeting with student-athletes did not have to do with the views she expressed, but the manner in which she went about expressing them.

*Barrett v. West Chester Univ. of Pa.*<sup>121</sup>

Current and former members of the West Chester University (WCU) women's gymnastics team moved for reconsideration of the attorneys' fees awarded to them in their Title IX lawsuit against the school. The plaintiffs had successfully persuaded the court to grant a preliminary injunction that prevented the university from eliminating the program. Later, the parties settled the suit, and the plaintiffs petitioned for over \$220,000 in fees and costs. After calculating the lodestar, the court reduced it by fifteen percent, and the final award was only two-thirds of the amount originally requested. Two law firms engaged as co-counsel for the plaintiffs in the case. The first was a public interest firm that did not charge clients for its services. The second agreed to help out based on its belief that there was an important social value in enforcing gender equity laws and viewed its risk of loss as a *pro bono* contribution. The court denied the plaintiff's motion, holding that it did not commit a clear error of law or create a manifest injustice when it decided to reduce the lodestar because both Pennsylvania taxpayers and the university's students would ultimately feel the brunt of those fees. The court noted that WCU was a public institution that was facing budgetary problems and that it would have to cut back on programs in order to pay off a large fee. The court found that the amount awarded reasonably balanced the parties' competing

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121. 636 F. Supp. 2d 439 (E.D. Pa. 2009).

interests and accomplished the goal of deterring future Title IX violations.

*Biediger v. Quinnipiac Univ.*<sup>122</sup>

Current and future Quinnipiac University women's volleyball players and their coach moved for a preliminary injunction to prevent the school from eliminating its women's volleyball program before the court could consider the merits of their claim that the school's athletic program did not comply with Title IX. The university's athletic department elected to cut the women's volleyball program and two men's teams after being informed that its budget was being cut by five-to-ten percent in the upcoming school year. At the same time, it decided to elevate the competitive cheerleading program to varsity status. The athletic department had previously implemented a roster management policy with roster floors for each sport in order to ensure participation opportunities for men and women were substantially proportionate to their respective enrollments. However, there was substantial evidence indicating that coaches were permitted to artificially inflate or deflate the number of student-athletes on their rosters prior to beginning of the school year, when universities are required to submit their annual Equity in Athletics Disclosure Act (EADA) report.

The court granted the motion, holding that the players and the coach had sufficiently demonstrated that the athletic department's decision would cause them irreparable harm and that they were likely to succeed on the merits of their Title IX claim. In assessing irreparable harm, the court noted that the school had agreed to honor the players' scholarships, but found that the decision to eliminate the program at the end of the previous school year limited their chances of transferring. It also emphasized that they would be required to sit out a season, which would affect their skills and their marketability in the recruiting process. The court noted that college athletes have a brief period of time in which they are eligible to participate and that any movement between schools will necessarily stunt their development. In assessing the merits of the Title IX claim, the court found that the decision to cut the volleyball program prevented the school from complying with the safe harbor for universities that provide substantially proportionate participation opportunities to men and women. The court emphasized that the school's roster management policy was not providing genuine participation opportunities to women because coaches were adding players who did not truly qualify for the teams based on their interests or abilities and cutting those players after the EADA reports were submitted. It also noted that the budgets

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122. 616 F. Supp. 2d 277 (D. Conn. 2009).



for those sports were not increased as spots were added. When coupled with the fact that men were added to teams after the reports were submitted, the court found that the participation gap for the upcoming school year would throw off gender proportionality to such a degree that retaining the women's volleyball program was the only immediate way to restore it. The court refused to allow the university to rely on the projected number of participants in its competitive cheerleading program to comply with the law because its estimate of the number of student-athletes that it would be able to offer genuine participation opportunities appeared to be overly optimistic.

*Equity in Athletics, Inc. v. Dep't of Educ.*<sup>123</sup>

A non-profit organization consisting of athletic boosters, coaches, fans, alumni, and parents, moved for summary judgment on its claim for a judgment declaring that the three-part test announced in the 1979 Title IX Policy Interpretation of regulations implementing Title IX violated the Fourteenth Amendment and Virginia law, and James Madison University (JMU) violated Title IX by relying on that interpretation in its decision to eliminate ten of its athletic teams in 2007. The U.S. Department of Education (DOE) and several other defendants, including James Madison University (JMU), also moved to dismiss that claim. JMU made its decision to drop its teams in order to satisfy Title IX's regulations' mandate to provide equal athletic participation opportunities. The DOE assessed compliance with that mandate through the three-part test, which included a safe harbor that JMU tried to satisfy by providing its female students with participation opportunities that were substantially proportionate to the school's enrollment numbers.

The court granted the defendants' motion on all of the organization's claims. Tackling the Fourteenth Amendment claim first, the court held that the three-part test did not violate the Equal Protection Clause, concluding that it did not require gender-based quotas when there were two other ways for universities to establish compliance with the regulations. The court noted that JMU could have avoided eliminating any athletic teams if it would have demonstrated that the interests and abilities of its female students were fully and effectively accommodated. It also emphasized that gender could play a role in Title IX compliance if it was rationally related to effectuating the government's interest in eliminating sex discrimination. Although the organization maintained that compliance should be based on actual interest in athletic participation, the court maintained that athletic interest was fostered by actual participation and that to allot participation opportunities based on actual

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123. 2009 U.S. Dist. LEXIS 121275 (W.D. Va. Dec. 30, 2009).

interest would only reinforce gender roles that Title IX was enacted to combat. The court relied on similar reasoning to dismiss the organization's state law claims that were not already barred by the Eleventh Amendment. Finally, the court held that JMU's decision to eliminate ten teams did not violate Title IX itself. It noted that the safe harbor—the first prong of the three-part test—did not require exact proportionality in athletic participation opportunities; therefore, the two-percent imbalance that still existed as a result of JMU's actions did not violate the law.

*Ollier v. Sweetwater Union High Sch. Dist.*<sup>124</sup>

Current and future female athletes at one of a school district's member schools moved for partial summary judgment in their Title IX gender equity lawsuit against the local school district. In one of their claims, the plaintiffs alleged that the school district did not provide equal athletic participation opportunities for female students. The court granted the motion on that claim, holding that the school district failed to satisfy any of the three options for establishing compliance that are laid out in the 1979 Title IX Policy Interpretation. After assessing the first option, the court determined that the district did not provide female students with athletic participation opportunities that were substantially proportionate to their enrollment at the high school because the six-point-seven percent difference reflected forty-seven additional female students who could have participated in sports. After assessing the second option, the court determined that the district did not show a history and continuing practice of expanding athletic participation opportunities for female students because there was no steady increase in the percentage of females participating. Finally, after assessing the third option, the court found that the district did not demonstrate the interests and abilities of female students were fully and effectively accommodated because it had eliminated its girls' field hockey program twice in the previous ten years without evidence that interest in the sport had waned and did not offer girls' tennis or girls' water polo in previous years despite evidence that enough female students expressed interest in fielding teams.

*Parker v. Ind. High Sch. Athletic Ass'n*<sup>125</sup>

The Indiana High School Athletic Association and thirteen Indiana high schools moved to dismiss Title IX and Fourteenth Amendment claims brought by one of the state's high school girls' basketball coaches on behalf of her two

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124. 604 F. Supp. 2d 1264 (S.D. Cal. 2009).

125. 2009 U.S. Dist. LEXIS 113395 (S.D. Ind. Dec. 2, 2009).

daughters, a sixteen-year-old who currently played high school basketball and a ten-year-old who hoped to play it in the future. The claims arose out of the defendants' decision to schedule their boys' sports in a more favorable way than their girls' sports.

The court granted the motion in part and denied it in part. First, it dismissed all claims relating to the coach's youngest daughter because any potential injury to her was too speculative and remote. After assessing the Title IX claims, the court held that the coach had sufficiently alleged that the thirteen members schools had violated the law based on their decision to schedule boys' events on more favorable days and at more favorable times. However, it dismissed the Title IX claim against the IHSAA because the coach had failed to demonstrate that the association was a recipient of federal funds. After assessing the Fourteenth Amendment equal protection claims, the court concluded that the coach's had sufficiently alleged that the IHSAA was sufficiently involved in the process of scheduling the boys' teams to play on more favorable days. However, it concluded that the claim against the schools was barred by the "sea clammers" doctrine, even though the U.S. Supreme Court had previously declared that Title IX was not the exclusive remedy for addressing gender discrimination in schools in *Fitzgerald v. Barnstable School Committee*.

#### INTELLECTUAL PROPERTY LAW

Intellectual property rights are becoming more and more valuable throughout the sports industry, as athletes, teams, schools, associations, and leagues find new and more innovative ways to exploit their trademarks and common-law publicity rights in the name of the bottom line. But the explosion in value has also forced rights-holders to take more precautions to protect those assets. The following cases demonstrate not only some of the methods used to take advantage of these rights, but how far the sports industry has sought to extend its control over them.

#### *CBS Interactive, Inc. v. Nat'l Football League Players Ass'n*<sup>126</sup>

Fantasy football provider CBS Interactive, Inc. (CBS) moved for partial summary judgment in a lawsuit that it brought against the NFL Players' Association (NFLPA) and one of its for-profit subsidiaries after they declared that CBS had to enter into a licensing agreement in order to use information about NFL players in its game. CBS sought a declaratory judgment extending the Eighth Circuit's decision in a similar case which held that a fantasy

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126. 2009 U.S. Dist. LEXIS 36800 (D. Minn. Apr. 28, 2009).

baseball provider violated Major League Baseball players' rights of publicity by using a similar package of information but that those rights had to give way to First Amendment considerations because the information was already in the public domain.

The court granted the motion, holding that the decision in the fantasy baseball litigation was controlling because the only distinction between the cases was the sport involved. It dismissed the NFLPA's argument that the package of information used by CBS implicated more publicity rights than the package used by the fantasy baseball provider and the NFLPA's assertion that the manner in which CBS used the information amounted to a greater exploitation of the rights. The court also determined that CBS's use of the information could not cause fantasy football consumers to believe any players endorsed its game and refused to speculate on whether the public had a lesser interest in football statistics than in baseball statistics.

*Con-Way, Inc. v. Conwayracing.com*<sup>127</sup>

A NASCAR Craftsman Truck Series team sponsor moved for a default judgment in an *in rem* action that it filed against a domain name registrant for violating the Anticybersquatting Consumer Protection Act (ACPA). The domain name resolved in a website that provided links to other websites offering goods and services associated with all forms of racing, including NASCAR. The sponsor owned a variety of registered trademarks that either incorporated or were derived from the term "Con-Way." When it contacted the domain name registrant via email, an individual responded with an offer to transfer the name for \$250. Although the registrant received actual notice of the lawsuit, he failed to appear. According to the domain name registrar, the registrant has been located at a variety of international addresses through the years, but has never been based in the United States. The court granted the motion and ordered the domain name registrar to transfer the domain name to the sponsor. After determining that it had personal jurisdiction over the registrant and service of process was proper, the court found the domain name created a likelihood of confusion with the sponsor's marks. It also determined that the registrant registered and used the name in bad faith because it attempted to sell the name for a fee. The court concluded that the domain name evidenced intent to divert customers to a website that could damage the goodwill engendered in the sponsor's mark, and all in the name of commercial gain.

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127. 2009 U.S. Dist. LEXIS 67111 (N.D. Cal. July 28, 2009).

*Cummings v. ESPN Classic, Inc.*<sup>128</sup>

Television network ESPN Classic, Inc. moved to dismiss former professional boxer Floyd Cummings's claim that it violated the Illinois Right of Publicity Act when it re-broadcasted a 1981 match between Cummings and former heavyweight champion Joe Frazier. The publicity law protected an individual's right to control how his identity was exploited for commercial purposes and Cummings claimed that the network did not get his permission to re-air the bout. The court granted the motion, holding that the re-broadcast did not violate the law because the law exempts the use of an individual's identity for non-commercial purposes and it specifically mentions sports broadcasts as a non-commercial purpose.

*Dallas Cowboys Football Club, Ltd. v. America's Team Props., Inc.*<sup>129</sup>

The Dallas Cowboys moved for summary judgment on claims that the team brought against an apparel manufacturer for allegedly infringing the team's trademarks associated with the phrase "America's Team" by producing merchandise emblazoned with those words. The manufacturer was assigned a federal trademark registration on that phrase by the owner of another entity that had applied for it in 1990. The registration was finally granted in 1995 and the mark had been continually used in commerce since that year. The Cowboys were granted a Texas state trademark registration on that phrase in 1992, but had been using it in commerce since 1978. The court granted the motion, holding that the Cowboys had trademark priority over the phrase and that the manufacturer's use created a likelihood of confusion as to the source, affiliation, or sponsorship of the merchandise that it sold. The court also concluded that the Cowboys had provided sufficient evidence to establish violations of both federal and state anti-dilution laws because the mark was famous and the manufacturer's use blurred its uniqueness and tarnished its reputation. Based on its decision, the court cancelled the manufacturer's federal registration and enjoined it from using the mark.

*Frayne v. Chicago 2016*<sup>130</sup>

The United States Olympic Committee (USOC) and the entity formed to

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128. 2009 U.S. Dist. LEXIS 17764 (S.D. Ill. Mar. 9, 2009), *motion for relief from judgment dismissed*, 2009 U.S. Dist. LEXIS 63769 (S.D. Ill. July 25, 2009), *motion for relief from judgment denied*, 2009 U.S. Dist. LEXIS 71937 (S.D. Ill. Aug. 14, 2009)

129. 616 F. Supp. 2d 622 (N.D. Tex. 2009).

130. 2009 U.S. Dist. LEXIS 1267 (N.D. Ill. Jan. 8, 2009), *motion for summary judgment granted in part*, 2009 U.S. Dist. LEXIS 92778 (N.D. Ill. Oct. 2, 2009).

promote Chicago's failed bid to host the 2016 Olympic Games (Chicago 2016) moved for summary judgment on free speech and equal protection claims brought by Stephen Frayne after they instituted a WIPO proceeding against him in an attempt to acquire the domain name "chicago2016.com." The defendants also moved for summary judgment on their Ted Stevens Olympic and Amateur Sports Act (Stevens Act) and Anticybersquatting Consumer Protection Act (ACPA) counter-claims. Frayne acquired the disputed domain name in 2004 through an online website. It was just one of over 1,000 domain names pairing a city and a future Olympic year that Frayne had registered over a six-year period ending in 2008. He claimed that he purchased the domains to provide forums for discussing issues related to hosting the Olympic Games. However, it was not until August 2008, after the defendants had initiated their WIPO proceeding, that he linked forum-generating information to the disputed domain name. Prior to that point, the domain name was being used as a parking page, although none of the revenues generated by it were forwarded to Frayne. Chicago 2016 registered a domain name that was substantially similar to the disputed domain name just four days after Frayne's original registration. Later, both Chicago 2016 and the USOC obtained federally registered trademarks on the phrase "Chicago 2016." Approximately six months after the USOC designated Chicago as its bid city for the 2016 Olympic Games, Chicago 2016 contacted Frayne to discuss obtaining the disputed domain name. One month later, Chicago 2016 implicitly threatened him by mentioning a favorable WIPO ruling on the domain name "madrid2012.com." However, Frayne maintained that he intended to use the disputed domain name as a forum and had no interest in selling it, and then resisted similar overtures from the Tokyo Organizing Committee on his "tokyo2016.com" domain name.

The court granted the defendant's motion on Frayne's constitutional claims, but denied the motion on the defendants' counter-claims, holding that there were genuine issues of material fact as to Frayne's knowledge that the disputed domain name was being used as a parking page and the time that "Chicago 2016" became associated with the Olympic Movement. Assessing the counter-claims first, the court determined that Frayne's current noncommercial use of the domain name was not relevant to the Stevens Act claim, which was based on his pre-August 2008 conduct. However, it also noted that Frayne did not receive any revenue from the domain name's use as a parking page, and ultimately concluded that there was uncertainty as to whether he "used" or "consented to the use" of a protected mark, which is required to find Stevens Act liability. The court also found that domain names pairing a city and a future Olympic year were not automatically protected by the statute, noting nothing in its language or history suggested its scope ranged

that far. The court also emphasized that a jury would have to determine when the phrase “Chicago 2016” became associated with the USOC, thereby creating common law trademark rights. Addressing the ACPA counter-claim, the court emphasized that the defendants would again have to prove that the phrase “Chicago 2016” was protected. In addition, the court found a genuine issue of material fact as to whether Frayne had a bad-faith intent to profit from that term. Finally, in granting the defendant’s motion on Frayne’s claims, the court concluded that both the USOC and Chicago 2016 were shielded from liability under the Noerr-Pennington Doctrine and similar state law immunities. In assessing Frayne’s federal law claims, the court emphasized that the WIPO proceeding was not a “mere sham,” especially when panels had previously held in favor of Olympic-related entities on identical domain name issues. Thus, even if those proceedings were initiated in a discriminatory manner, Frayne’s claims were barred. In assessing Frayne’s state law claims, the court noted that the defendants could not single out one domain name if it was unrelated to protecting their trademark interests. However, the court found no evidence to suggest that the USOC or Chicago 2016 acted with actual malice when they ignored other similar domain names, citing the lack of commercial content on those sites.

In an earlier decision in the same litigation that partially granted a motion to dismiss all of Frayne’s claims, the court concluded that Frayne could not maintain his cause of action for attempted reverse domain name hijacking because no language in the ACPA, which creates a cause of action for reverse domain name hijacking, also creates a separate cause against parties that attempt to suspend, disable, or force the transfer of a domain name.

*Heisman Trophy Trust v. Smack Apparel Co.*<sup>131</sup>

After the court granted its earlier motion for a preliminary injunction to prevent an apparel company from infringing and diluting its trademarks, the Heisman Trophy Trust (HTT) moved for partial summary judgment on its claim against the company for breaching a settlement agreement arising out of a prior trademark infringement lawsuit and for a permanent injunction to bar the company from continuing to manufacture and market t-shirts that use a derivative of the word “Heisman” in referring to specific college football players. The court granted the HTT’s motion, holding the apparel company’s use of the HTT’s marks created a likelihood of confusion as to the t-shirts’ origin or endorsement, which automatically established both the likelihood of

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131. 595 F. Supp. 2d 320 (S.D.N.Y. 2009), *motion for partial summary judgment and a permanent injunction granted*, 637 F. Supp. 2d 146 (S.D.N.Y. 2009).

success on the merits and irreparable harm needed to grant the injunction. In weighing the factors used to assess a likelihood of confusion, the court noted the strength of the “Heisman” marks in connection with promoting college football, and the strong similarity between those marks and the marks used on the apparel manufacturer’s t-shirts. It emphasized that the company’s marks could create a false impression when viewed from a distance, especially when they used the same type of font that is used in the “Heisman” marks. The court also recognized the close competitive proximity between the parties’ products, which are both available on websites and in retail stores that cater to college football fans. In dismissing the company’s parody defense, the court emphasized that the t-shirts did not convey two simultaneous and contradictory messages because they failed to demonstrate that they were not, in fact, officially-licensed products. Instead, they gave the impression that they were approved by the marks’ owner.

*John Daly Enters., LLC v. Hippo Golf Co.*<sup>132</sup>

Professional golfer John Daly and his wholly-owned LLC moved for partial summary judgment on claims that they brought against a golf equipment manufacturer after it continued to use Daly’s name, likeness, and signature following the expiration of their endorsement and licensing agreements and failed to make all royalty payments due under the licensing agreement. Under the endorsement agreement, Daly earned \$200,000 per year to make public appearances and display the manufacturer’s logo on his clothing during tournaments. However, when the contract expired, the manufacturer continued to display Daly’s name and likeness on its website without authorization. Under the licensing agreement, Daly earned royalty payments in exchange for the right to use his name, likeness, and trademarks in the sale of the manufacturer’s equipment. When that contract ended, Daly agreed to give the manufacturer three additional months to sell off its remaining merchandise linked to him. However, the manufacturer continued to sell Daly-branded equipment beyond that three-month period and failed to make all royalty payments due on those sales.

The court granted the plaintiff’s motion as to the manufacturer’s liability on all of the claims, but denied it as to the question of damages on those claims. In addition, the court denied the plaintiff’s motion for summary judgment on Daly’s claim for alter ego liability stemming from a judgment obtained against the manufacturer’s parent company in prior litigation. In assessing the plaintiff’s trademark infringement claims, the court noted that

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132. 646 F. Supp. 2d 1347 (S.D. Fla. 2009).



the only trademark in existence at the time of the alleged infringement covered Daly's signature and swing logo in combination, and that the merchandise that the manufacturer continued to sell only featured the golfer's signature. However, the court found the signature was enough to establish liability because it was a colorable imitation of Daly's registered mark that was likely to cause confusion. In assessing the plaintiff's state law claim for unauthorized use of his name and likeness on the manufacturer's website, the court found that the manufacturer could not rely on a fair use defense because Daly's features were used in a manner that continued to constitute commercial exploitation. But in declining to establish damages on that claim, the court emphasized that the alleged fair market value of those features far exceeded the compensation that Daly was guaranteed under the endorsement agreement. Finally, in assessing Daly's breach of contract claim, the court determined that the manufacturer's admission that it failed to make royalty payments on sales following the expiration of the licensing agreement conclusively established liability.

*Marcinkowska v. IMG Worldwide, Inc.*<sup>133</sup>

Former professional tennis player Renata Marcinkowski appealed a trial court's decision to dismiss claims that she brought against an Argentina-based advertising agency and IMG for allegedly infringing her patent on dual-surface tennis courts, engaging in false advertising, and violating South Carolina law when they staged a match between Roger Federer and Rafael Nadal in Mallorca, Spain. The court used in the match had a clay surface on one side of the net and a grass surface on the other side of the net. IMG promoted the exhibition on its website and controlled the rights to broadcast it in the United States. The circuit court affirmed, holding that the advertising agency was not subject to personal jurisdiction on any of Marcinkowski's claims and IMG did not violate any federal or state laws through its activities. In assessing whether there was personal jurisdiction over the advertising agency, the court noted that Marcinkowski had initiated all email correspondence between the parties in her effort to license her patent. In assessing the claims against IMG, the court emphasized that patent laws had no force or effect outside of the United States, and that the tennis court created for the match was only used in Spain. Although that use was broadcast in the U.S., none of IMG's allegedly infringing activities were conducted within the country. The court also concluded that a statement on the IMG website asserting that the president of the advertising agency came up with the idea for

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133. 342 F. App'x 632 (Fed. Cir. 2009).

the court was not false advertising because the Lanham Act only protects inventions associated with goods or services.

*Pro Football, Inc. v. Harjo*<sup>134</sup>

Native Americans appealed a district court's decision to reverse the Trademark Trial and Appeal Board's order cancelling the federal trademark registrations of the Washington Redskins and grant summary judgment to the team on the Native Americans' petition under the defense of laches. The Native Americans claimed the registrations disparaged members of their ethnic group in the manner prohibited by section two of the Lanham Act. The D.C. Circuit affirmed, holding that the district court properly assessed the evidence of prejudice in applying the laches defense to the facts of the case. First, the court resolved a conflict over the standard for reviewing a laches determination by concluding that it could only overturn a district court's decision on how to apply the defense to the facts if there was an abuse of discretion. In assessing that decision, the court agreed that the Redskins could suffer trial and economic prejudice based on the Native Americans' delay in bringing the petition. In tackling trial prejudice, the court found that the Redskins would have difficulty gathering evidence to support its mark because the team employee who met with Native Americans to discuss their views on the team's name before it was registered had died, and it took eight years after the youngest petitioner reached the age of majority before the claim was made. In tackling economic prejudice, the court found the team had engaged in a significant expansion of its merchandising efforts and invested heavily in its mark during the eight-year delay, and that the delay could be viewed as unreasonable when the youngest petitioner was exposed to the team's trademarks prior to reaching the age of majority. Finally, the court held that a claim relating to the trademark associated with the team's cheerleaders was also barred by the laches defense, even though the mark was not registered until 1990. The court found that the two-year delay in bringing that claim could be viewed as unreasonable in light of the mark's similarity to the other trademarks at stake.

*Steele v. Turner Broad. Sys., Inc.*<sup>135</sup>

After the court denied their earlier motion to dismiss copyright

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134. 565 F.3d 880 (D.C. Cir. 2009).

135. 607 F. Supp. 2d 258 (D. Mass. 2009), *motion for summary judgment granted*, 646 F. Supp. 2d 185 (D. Mass. 2009), *motion for reconsideration denied*, 2009 U.S. Dist. LEXIS 98739 (D. Mass. Oct. 13, 2009).

infringement claims brought by Samuel Steele, all but one of the remaining media defendants moved for summary judgment on those claims, which arose after a song that Steele wrote about the Boston Red Sox during the team's 2004 World Series championship season was allegedly used to create an advertisement promoting Major League Baseball post-season telecasts three years later. Steele's song was well-known around Boston's Fenway Park, and he received a federal copyright to protect it in 2006. He also created a derivative version of the song that removed specific references to the Red Sox and allowed the names of other team and cities to be filled in. Steele claimed a TBS network promo featuring a song by Bon Jovi infringed his copyright because the visuals were derived from Steele's song and the Bon Jovi song was based on those visuals, Steele's song, or both.

The court granted the media defendant's motion, holding there was no substantial similarity between Steele's song and either the promo's visuals or the Bon Jovi song to sustain his claims. Applying the "ordinary listener" standard, the court found there was not enough musical similarity or lyrical similarity between the songs. It noted that an expert report submitted by Steele admitted there was a weak musical link, and that the few phrases in Steele's song that were actually protectable were eclipsed by the fact that the Bon Jovi song was not about baseball. After comparing Steele's work to the visuals from the promo, the court concluded that any matches between the images and his protectable lyrics were the inevitable result of playing a song about baseball under an advertisement about the sport. It also found that the number of times the promo corresponded with the Bon Jovi song exceeded the number of times it corresponded with Steele's work. Finally, the court emphasized that Steele's concept of an adaptable song was not protected under federal copyright law, and that his rights were not violated just because the promo's visual sequences appeared synchronized to his song's beat.

*Univ. of Kan. v. Sinks*<sup>136</sup>

An online retailer moved for judgment as a matter of law following a jury verdict in favor of the University of Kansas (KU) on trademark dilution claims that the university brought against the retailer after the retailer sold t-shirts incorporating the school's trademarks and fans attending KU athletic events complained that those t-shirts had a negative effect on the school's reputation. KU also moved for contempt sanctions and to amend the permanent injunction granted against the retailer because the retailer continued to sell infringing t-shirts following the trial court's judgment. The court denied the retailer's

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136. 644 F. Supp. 2d 1287 (D. Kan. 2009).

motion and KU's motion for contempt sanctions, but granted KU's motion to amend the permanent injunction. After assessing the retailer's motion for judgment as a matter of law, the court concluded that a reasonable jury could find that the retailer's use of KU's athletic trademarks caused actual dilution through tarnishment, and that those marks had achieved more than niche fame. The court noted that tarnishment could be established by reviewing the offending t-shirts in concert with fan complaints, and that KU's marks enjoyed widespread recognition outside the context of collegiate sporting events. However, the court refused to assess contempt sanctions against the retailer after determining that it could have reasonably misunderstood the scope of the permanent injunction. The court recognized that the injunction failed to specify that it also covered t-shirts similar to those that were previously found to have infringed KU's trademarks in a summary judgment order. For that reason, the court amended the permanent injunction to make it clear that it prohibited the retailer from selling t-shirts found to be infringing by either the jury or the court.

*U.S. Olympic Comm. v. Xclusive Leisure & Hospitality Ltd.*<sup>137</sup>

The United States Olympic Committee (USOC) and the International Olympic Committee (IOC) moved for a preliminary injunction in a lawsuit that they brought against the operators of seven websites that allegedly incorporated the committees' trademarks into the names and pages of the sites in order to mislead consumers into believing that the products offered for sale were official tickets to events at the 2008 Olympic Games. Both the USOC and the IOC had been using the words and symbols that make up those marks since the nineteenth century and owned several federal trademark registrations that incorporated them. The marks represented the goodwill that both the USOC and the IOC have engendered through the years and were used to generate revenue through the sale of broadcast rights and the promotion of marketing, licensing, and sponsorship programs. They are also protected under the Stevens Act, which gives the USOC the exclusive right to use and exploit them in the United States. Using its power under that law, the USOC entered into an exclusive licensing agreement with a third party that made that company the sole provider of official Olympic tickets in the United States. However, at least one major media company incorrectly reported that one of the defendants' websites also offered official tickets. More importantly, the consumers who bought tickets off any of those sites never received them.

The court granted the motion, holding that the USOC and the IOC

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137. 2009 U.S. Dist. LEXIS 12698 (N.D. Cal. Feb. 19, 2009).

established a likelihood of success on the merits of all their claims and would suffer irreparable harm in the absence of an injunction. In assessing the trademark infringement claims, the court found that the defendants' actions would create a likelihood of confusion as to the source of the tickets because they used the same, well-known, heavily-protected trademarks in the same service that was offered by the USOC and the IOC. Because they established a likelihood of success on the merits of those claims, the USOC and the IOC were entitled to a presumption of irreparable harm. But even in the absence of that presumption, the court would still have found irreparable harm, noting that the defendants had crippled the value of the marks because they used them to defraud the public and harmed the plaintiff's relationships with their sponsors. The court concluded that the public interest militated against allowing the defendants to continue to confuse consumers and place them at the risk of being defrauded.

*Young v. Vannerson*<sup>138</sup>

Three individuals and the joint venture that they formed after one of them filed applications for registered trademarks on the terms "VY" and "Invinceable" moved to dismiss professional football player Vince Young's claims for declaratory and injunctive relief that would prevent them from exploiting the marks. Young alleged that the defendants' use of those marks would infringe his common law trademark rights in his initials and nickname. He had applied for similar registered trademarks on those terms and previously entered into an endorsement contract with a shoe company that sells products with a "VY" logo. The defendants had already engaged in substantial preparations to commercially exploit the marks, including the development of a marketing logo that was similar to the "VY" logo used by the shoe company. The defendants also created sample products using those terms that they hoped to license directly to Young.

The court denied the defendant's motion, holding that it had subject-matter jurisdiction to issue a declaratory judgment and that Young had adequately alleged a cause of action for trademark infringement. The court noted that it could not issue relief under the Declaratory Judgment Act (DJA) unless there was an actual controversy that was justiciable under Article III of the federal constitution. But after analyzing relevant case law, the court concluded that Young did not have to possess a reasonable apprehension of suit before bringing his claim and that the totality of the circumstances suggested the existence of an actual controversy. It emphasized that Young

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138. 612 F. Supp. 2d 829 (S.D. Tex. 2009).

was in the position of pursuing arguably illegal behavior or abandoning activities that he believed that he had a right to do and that the defendants had engaged in meaningful preparation to conduct potentially infringing activities. In assessing the motion to dismiss, the court found that Young's allegations sufficiently addressed whether he was the owner of protectable trademarks and whether the defendants were attempting to use those marks in a manner creating a likelihood of confusion as to the source, endorsement, or sponsorship of their products.

#### LABOR LAW

Federal labor laws govern the relationship between employers and employees who are currently unionized or seeking to create a union. Because the athletes in almost every major professional sports league in the United States have established players' associations, these laws play a leading role in some of the most highly-publicized legal issues in sports. Most of those issues relate directly to collective bargaining agreements, which govern the rights and responsibilities of both athletes and the teams that employ them. A couple of major disputes unfolded in this realm over the past year; however, their outcome may have a profound impact on the future of the National Football League.

#### *Williams v. Nat'l Football League*<sup>139</sup>

The NFL, one of its vice presidents, and its drug policy administrator appealed a district court's decision to deny their motion for summary judgment on state statutory claims brought by Minnesota Vikings players Kevin Williams and Pat Williams after they were suspended for four games for violating the league's drug policy by ingesting a banned substance contained in an over-the-counter weight-loss supplement called "StarCaps." The players also cross-appealed the district court's decision to grant the defendants' motion for summary judgment on the players' state common law claims and confirm arbitration awards that upheld the suspensions. Both the league and the drug policy administrator knew some of the StarCaps contained the banned substance. In 2006, several players tested positive after using the supplement, but the administrator chose not to discipline them. The vice president subsequently informed the administrator that he did not have the discretion to determine whom to discipline under the drug policy; however, nobody warned the players that StarCaps contained a banned substance. Instead, the vice president chose only to inform the NFL Players' Association

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139. 654 F. Supp. 2d 960 (D. Minn. 2009), *aff'd*, 582 F.3d 863 (8th Cir. 2009).

(NFLPA) that the league would no longer allow players to provide endorsements for the supplement's distributor. After the plaintiffs tested positive, NFL Commissioner Roger Goodell designated the league's chief legal officer to rule on their appeals at the arbitration hearing, even though that officer had previously given legal advice to the league on the matter.

The Eighth Circuit affirmed in all respects, holding that the players' state statutory claims were not barred by section 301 of the Labor Management Relations Act (LMRA) but that their state common law claims were pre-empted, and that there was no statutory or judicially-created reason for vacating the arbitration awards. Assessing the state statutory claims first, the court concluded that pre-emption was not mandated because neither the Minnesota law governing drug testing in the workplace (DATWA) nor the Minnesota law governing consumable products (CPA) required it to interpret the league's drug policy or other aspects of the league's collective bargaining agreement (CBA) to determine if a violation had been committed. The court noted that the NFL had conceded that the league's drug testing procedures did not comply with the letter of the DAWTA and found that it would only have to compare those procedures with the law's requirements to determine if a violation had taken place. The court also emphasized that the LMRA did not give the league the power to avoid any state regulatory law just to ensure uniform enforcement of the drug policy. The court found that the CPA claim was not barred for similar reasons, emphasizing that it did not need to determine whether the policy's ban on diuretics was a bona fide occupational requirement because those requirements were defenses to liability, and thus not relevant to a section 301 analysis. The court also noted that the CPA's application to the use of products off an employer's premises or during non-working hours was irrelevant because there were no provisions in the CBA that suggested players were always on the clock in training camp, which is when the positive tests occurred. However, after assessing the state common law claims, the court determined that it would have to interpret the drug policy or CBA to determine whether the NFL owed the players a duty to warn against using StarCaps and whether the players were justified in relying on the league's silence. It noted that those issues would depend entirely on the parties' legal relationship and expectations, which would require an examination of the agreements between the league and the union.

Finally, the court concluded that the arbitration award was not contrary to public policy, contrary to the essence of the drug policy, or rendered by a biased arbitrator. In assessing whether the award was contrary to public policy, the court concluded that no fiduciary duty was breached because the administrator would have told any player who called him that StarCaps contained the banned substance, and he had the discretion under the policy to

send a general warning—rather than a product-specific warning—if he believed that all weight-loss products carried risks. In assessing whether the award was contrary to the essence of the drug policy, the court noted that a policy provision prohibiting the vice president from influencing the administrator's decision whether to discipline players was added over one year after the alleged influence in this case. But even if it had applied, the court found the award still drew its essence from the policy, emphasizing that the administrator's actions prior to hearing from the vice president were not an issue. In assessing whether the arbitrator who rendered the award was biased, the court found no evidence in any of the testimony at the hearings or in the arbitrator's rulings that suggested he was one-sided, and determined that the plaintiffs waived their right to object to his appointment because it was foreseeable that he would provide legal advice to the league. The court also emphasized that both the NFLPA and the players actually requested him because of his involvement with the case.

*White v. Nat'l Football League*<sup>140</sup>

The NFL appealed (1) a district court's decision to overturn a special master's determination that the Atlanta Falcons could recover prorated portions of the \$29.5 million in roster bonuses that the team had paid to quarterback Michael Vick before he pled guilty to federal dog fighting charges and was suspended indefinitely by the league, and (2) the district court's decision to deny the NFL's subsequent motion to vacate the judgment. Relying upon the consent decree that it issued following the historic 1993 antitrust settlement agreement between the NFL and the NFL Players' Association (NFLPA) to assert jurisdiction, the district court held that Vick was entitled to keep the bonus payments that he had received because they had already been earned under the terms of the updated settlement agreement and the NFL Collective Bargaining Agreement (CBA). In its motion to vacate, the NFL claimed that (1) the court did not have jurisdiction over the dispute because the consent decree should have been modified to eliminate the court's oversight, and (2) the district court judge should have recused himself from the case.

The Eighth Circuit affirmed. First, it concluded that the United States Supreme Court's decision in *Brown v. Pro Football, Inc.* and changes in factual circumstances were not significant enough to warrant a modification of the settlement agreement. The court emphasized that the law in the Eighth Circuit when it entered the consent decree was consistent with the holding in

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140. 585 F.3d 1129 (8th Cir. 2009).



*Brown* and that changes in factual circumstances rarely provide a basis for modification when they are expected from the outset of a settlement agreement. Second, the court held that the judge's statements to the press about his role in the 1993 settlement agreement may have been unwise, but did not constitute evidence of a bias towards the NFLPA that required recusal. It noted that the statements did not even reference the Vick matter, only events that occurred over a decade earlier. Finally, the court concluded that the "already-earned" test was the appropriate test to apply in determining whether Vick was entitled to retain his bonus payments. It emphasized that roster bonuses were not considered signing bonus allocations under the terms of the settlement agreement and the CBA; thus, they were not subject to forfeiture for the years not performed on Vick's contract with the team.

#### PROPERTY LAW

Since the late 1980s, record numbers of professional sports franchises have sought financial assistance from their host cities in building new state-of-the-art playing facilities. However, many members of the public have openly vocalized opposition to these requests, especially property owners in the vicinity of a planned project. Relying on the constitutional and state laws governing real property and its use, property owners have sought to prevent proposed facilities from being constructed or compensation for the facilities' impact on the enjoyment of their land. This section analyzes litigation arising out of these disputes, as well as cases related to the faulty construction of facilities.

#### *Cascott, L.L.C. v. City of Arlington*<sup>141</sup>

Property owners appealed a trial court's decision granting summary judgment to the City of Arlington on their claim the city violated the Texas Constitution's ban against taking land for a purely private purpose when it exercised its eminent domain power to build a new stadium for the Dallas Cowboys and entered into a favorable lease with the team. The appellate court affirmed, holding that both the stadium project and the lease served a public purpose. In assessing the stadium project, the court emphasized that voters approved the city's actions and that any approved venue project was considered owned, used, and held for a public purpose under state law. In assessing the lease, the court emphasized the city's agreement only had to further and promote the established public purpose, regardless of whether a private actor benefited from it.

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141. 278 S.W.3d 523 (Tex. App. 2009).

*Enclave Arlington Assocs. Ltd. P'ship v. City of Arlington*<sup>142</sup>

The City of Arlington moved for summary judgment on claims brought against it by the owner of a 348-unit apartment building after some residents of the building submitted notices to the owner they intended to move out due to noise and traffic problems created by nearby Cowboys Stadium, the new home of the Dallas Cowboys. The city had approved the plans for the construction of the stadium. The building owner claimed the city's decision violated the Fourth Amendment, Fifth Amendment, and Fourteenth Amendment, and created a private nuisance. The court granted the motion on all of the owner's claims. After assessing the Fourth Amendment claim, the court concluded the owner failed to demonstrate that a property seizure "meaningfully interfere[d] with its possessory interests." While the additional traffic and noise were "disruptive or inconvenient," those interferences were not sufficient to sustain the owner's claim. After assessing the Fifth Amendment claim, the court concluded that the additional traffic did not constitute a physical taking, because it was only a residual effect of the completion of the new stadium. It emphasized the city's authority to regulate traffic fell within the city's police power, and that the stadium's construction constituted a public purpose because it was approved under Texas law. After assessing the owner's Fourteenth Amendment substantive due process claim, the court held that the city's decisions related to the regulation of traffic around the stadium were rationally related to the legitimate state interest of maintaining safe roads. Finally, the court summarily dismissed the private nuisance claim because the city never waived its immunity to tort suits brought against it. Because there was no violation of the Fourth or Fifth Amendments, the city retained its immunity from liability.

*Goldstein v. N.Y. State Urban Dev. Corp.*<sup>143</sup>  
*Develop Don't Destroy v. Urban Dev. Corp.*<sup>144</sup>

In companion cases, Brooklyn property owners: (1) sought a declaration that the New York Constitution prevented the New York State Urban Development Corporation (UDC) from taking property for a redevelopment project, including a new basketball arena for the New Jersey Nets, and (2) appealed a trial court's decision to dismiss claims relating to the administrative findings made by the UDC to green-light the project. The project's co-developer was a company owned by the same individual who owned the Nets.

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142. 669 F. Supp. 2d 735, (N.D. Tex. 2009).

143. 879 N.Y.S.2d 524 (App. Div. 2009), *aff'd*, 921 N.E.2d 164 (N.Y. 2009).

144. 874 N.Y.S.2d 414 (App. Div. 2009).

Nevertheless, the Second Circuit had previously affirmed a district court's decision to dismiss the property owners' claim that the takings violated the Fifth Amendment, holding that the UDC's determination that the project advanced several public purposes was not a pretext for providing a new publicly-financed arena to the privately-owned team.

The appellate court held that the state constitution did not prevent the corporation from condemning the property and affirmed the decision related to the administrative findings of the UDC. In assessing the constitutional claim, the court concluded the state's takings clause was no more restrictive than its federal counterpart, refusing to read the public use language in a manner that would allow takings only when the property was held open for use by the entire public. The court noted that a court expressly rejected this view in a previous decision and would be at odds with the statutory authority that allowed the court to review the UDC's determination. The court also followed the federal district court in finding that the public benefits of the project were not illusory. In assessing the administrative claim, the court concluded the UDC's Environmental Impact Statement (EIS) complied with the requirements of the state's environmental quality review law, and the corporation's decisions to include property located outside a designated urban renewal area within the project area and to designate the arena as part of a "civil project" were permitted under state law. In assessing the EIS, the court found the UDC was not required to address the risk of terrorism, did not arbitrarily select the project's build years in order to skew the analysis of the environmental effects, and did not irrationally select the project over other feasible alternatives. In assessing the UDC's discretionary decisions, the court held that it had to defer to the agency's determinations that the project area was blighted, and that the arena had a public purpose unless those determinations were entirely baseless.

*Myers v. Wild Wilderness Raceway L.L.C.*<sup>145</sup>

Wild Wilderness Raceway L.L.C. and its owners appealed a trial court's decision to partially deny their motion for a new trial in a lawsuit brought against them by surrounding property owners who claimed the noise, dust, and light emanating from the racetrack constituted a private nuisance and tortiously interfered with their businesses. The raceway's owners originally constructed the facility on the family's property so their son, a burgeoning motocross star, could practice the sport. But the track eventually grew into a prime venue to hold races, which took place several days a week and ran as

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145. 908 N.E.2d 950 (Ohio Ct. App. 2009).

late as 10:30 p.m. The trial court permanently enjoined the raceway's owners from using the facility and awarded damages and attorneys' fees to the surrounding property owners. But following a motion for a new trial, a new judge modified the injunction's scope, preventing only commercial use and vacated the award of damages and attorneys' fees.

The appellate court affirmed, holding there was evidence to support the determination the raceway constituted a nuisance and the trial court did not abuse its discretion in fashioning the permanent injunction. The court also denied the surrounding property owners' cross-motions arising out of the new judge's decision to modify the injunction and vacate the award of monetary damages and attorneys' fees. In finding a nuisance, the court noted there was substantial testimony indicating noise came from the Wild Wilderness Raceway and it rose to a level that prevented the surrounding property owners from enjoying their land, deterred people from patronizing businesses, and caused property values to decline. The court determined the injunction was not overbroad because it did not prevent the raceway's owners from using the facility for its original purpose. It also noted there would be an absence of any real harm because the raceway's owners were already operating at a loss. In denying the surrounding property owners' cross-motions, the court emphasized that they had not proven their monetary damages with reasonable certainty and that the raceway's owners had a right to use the property for personal enjoyment.

*Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*<sup>146</sup>

The Washington State Major League Baseball Stadium Public Facilities District appealed a trial court's decision granting summary judgment to a construction company on the district's breach of contract claims against it after determining the state's six-year statute of limitations had expired. The district was created under state law to develop and own Safeco Field, the home of the Seattle Mariners. It sought damages from the company for its alleged failure to construct the stadium in accordance with their contractual provisions after the team discovered a construction defect related to fire coating protection and was forced to pay over two million dollars in repairs. The Washington Supreme Court reversed, holding the statute of limitations did not bar the district's claims because lawsuits brought for the benefit of the state are exempt from the statute of limitations. The court emphasized that municipal bodies that initiate actions arising out of the exercise of traditional sovereign

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146. 202 P.3d 924 (Wash. 2009).

functions delegated to them by the state are brought for the benefit of that state and that building Safeco Field involved a traditional sovereign function because the state was responsible for providing public recreational benefits.

#### STATUTORY LAW

There are few federal and state statutes that are directed specifically at some aspect of the sports industry. However, many seemingly innocuous laws have also had an indirect but profound impact on private associations, leagues and teams, as well as third parties. This section analyzes issues arising from these statutes, which have resulted in some of the most highly-publicized cases this year.

#### *Herman v. Admit One Ticket Agency L.L.C.*<sup>147</sup>

Colman Herman appealed a decision to reverse a trial court's ruling that a licensed online ticket reseller violated Massachusetts law by offering to sell Red Sox tickets to him at a price higher than the limitations established by a state statute. Herman claimed he was willing to pay the maximum amount allowed by law for the tickets, but never purchased them after the reseller sought \$500 per ticket to a game against the Yankees and \$165 per ticket to a game against the Orioles. The tickets had a face value of eighty-five dollars. State law proscribed unfair practices in conducting a business, and a state statute established it was an unfair practice for a licensee to resell a ticket to a professional sporting event at more than two dollars above face value.

The Massachusetts Supreme Court affirmed, holding Herman lacked standing to bring a claim under state law because he failed to actually purchase a ticket. Although one could violate state law without the actual sale of a ticket, the court emphasized the state statute allowed resellers to impose certain fees, including service charges, in every transaction, and that there were no stated restrictions on those fees. Therefore, it found that purchasers would be unable to establish that they were able to pay for a ticket at a price consistent with the statute, and that they would actually have to purchase a ticket to have standing to maintain a claim for unfair practices. In a vigorous dissent, Justice Cowan argued that the majority confused the issue of standing with the amount of evidence necessary for Herman to prevail on the merits of his claim.

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147. 912 N.E.2d 450 (Mass. 2009).

*Nat'l Collegiate Athletic Ass'n v. Associated Press*<sup>148</sup>

The National Collegiate Athletic Association (NCAA) appealed a trial court's judgment in favor of the Associated Press and other news organizations on their public records claim against the NCAA that required it to disclose documents related to disciplinary action taken against Florida State University for providing improper academic assistance to student-athletes in violation of the NCAA's rules. After the university reported its findings of a self-investigation, the NCAA initiated proceedings to determine how to punish the school for its misconduct. Following a hearing in front of the Committee on Infractions (COI), the NCAA imposed a variety of penalties. Among those penalties was vacating victories by the football team, which inhibited former coach Bobby Bowden's quest to have the most coaching in Division I history. The transcript from the hearing was not made available to the public, and neither was the COI's subsequent response to the university's appeal. However, both of those documents were made available to lawyers for an outside firm hired to represent the school. The NCAA placed the documents on a secure website, which required the firm to sign a confidentiality agreement that promised none of the information obtained would be disclosed. The lawyers viewed the transcript in preparing the school's appeal, and the COI's response just over a month later.

The appellate court affirmed, holding that: (1) the transcript and response were considered public records under state law, (2) the law did not violate the federal constitution, and (3) the documents at issue were not exempt from disclosure under federal statutory law. The court concluded both of the documents were public records under state law because an agent of the state government received them. It emphasized that the state constitution gave the public broad rights to inspect governmental records, and that the state law enforcing those rights covered documents maintained on a secure website, as long as they contained material prepared in connection with official agency business. The court found that the law firm qualified as an agent of the state, and that it viewed the documents in connection with its public function. The court also noted that the confidentiality agreement had no bearing on its determination because public records could not be transformed into private records just because a government agency promised not to disclose them. After assessing whether the Florida public records law was unconstitutional as applied, the court found the statute did not run afoul of either the Dormant Commerce Clause or the First Amendment. It emphasized the law did not deal with the subject of commerce, and even if it had an indirect effect, the

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148. 18 So. 3d 1201 (Fla. Dist. Ct. App. 2009).

impact would be heavily outweighed by the state's interest in promoting open government. The court also distinguished *NCAA v. Miller* on the grounds that the public records statute was a law of general application, not a law designed to regulate the NCAA's disciplinary proceedings. Moreover, based on the variety of other state statutes that would be interpreted to provide the same or even better access, the court found that the law did not force the NCAA to conform its conduct to Florida's standards. The court dismissed the NCAA's freedom of association argument because the statute did not impair its ability to reject the values it wished to promote. Finally, in assessing whether the documents were exempt from disclosure under federal law, the court emphasized that the Federal Educational Rights and Privacy Act only protects educational records, which have been defined as records containing information directly related to a student. The court noted that the documents at issue only tangentially related to Florida State student-athletes, and that, even if there was a more direct connection, they were still not protected because every individual's identifying information had been redacted.

*Office of the Comm'r of Baseball v. Markell*<sup>149</sup>

Professional sports leagues appealed a district court's decision to deny their motion for a preliminary injunction to prevent Delaware state officials from implementing a sports lottery involving single-game betting on nearly all collegiate and professional sporting events under regulations proposed pursuant to the Delaware Sports Lottery Act (DSL). The leagues argued that the DSL and the proposed regulations violated the Professional and Amateur Sports Protection Act (PASPA), a federal law that prohibits state-sponsored sports gambling. However, the PASPA contains an exception that authorizes gambling schemes in individual states to the extent those schemes were conducted between 1976 and 1990. In 1976, Delaware conducted a sports lottery that involved parlay betting on NFL games. In March 2009, the state governor asked the state's high court for its interpretation of a provision in the state constitution to determine if he could legally implement a sports lottery that was approved by the state legislature. That court concluded that the parlay betting authorized by the lottery was constitutional because chance was its dominant factor; however, it refused to pass judgment on whether the lottery could involve bets on single games.<sup>150</sup>

The Third Circuit reversed, holding the DSL and the proposed

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149. C.A. No. 09-538 (GMS), 2009 U.S. Dist. LEXIS 69816 (D. Del. Aug. 10, 2009), *vacated*, 579 F.3d 293 (3d Cir. 2009).

150. *See In re Governor for an Advisory Opinion*, 2009 Del. LEXIS 255 (May 27, 2009).

regulations violated the PASPA because they expanded Delaware's 1976 sports lottery scheme to cover new sports and single-game betting. After determining it had jurisdiction to look beyond whether the district court abused its discretion and assess the merits of the leagues' claim, the court determined that the plain language of the PASPA exception only allowed Delaware to conduct a sports lottery scheme that was substantially similar to the scheme conducted in 1976, regardless of whether a larger scheme had been authorized at that time. It noted that minor alterations in the scheme would not violate the PASPA's language or undermine its central purpose, but found expanding betting to include single-game action and sports outside of the NFL would create the same problems that the law was intended to combat.

*Yousoufian v. Office of Ron Sims*<sup>151</sup>

The Office of the Executive of King County, Washington appealed an appellate court's decision reversing a trial court judgment imposing a fifteen-dollar per day fine on the county for its gross negligence in failing to comply with Washington's public records law when dealing with an individual that requested studies on the impact of sports stadiums on the local economy. The request came just weeks prior to a referendum election in which voters would decide whether to publicly finance a new venue for the Seattle Seahawks. However, the county repeatedly deceived and misinformed the individual over a period of four years before it finally provided access to all the records that it either possessed or failed to attempt to locate. The public records law included a penalty provision allowing a court to impose a fine ranging from \$5–\$100 per day, depending on the agency's actions. The appellate court concluded the trial court abused its discretion in imposing a fine on the lower end of the range scale. The Washington Supreme Court affirmed, holding that the absence of economic loss and the lack of actual public harm did not call for a lower penalty, and the fine imposed must be adequate to deter future violations. It noted that actual economic damages might call for a higher penalty, but emphasized that the penalty's main purpose is to promote access to public records. The court also emphasized that penalties are not contingent on actual public harm, only whether there is the potential for it.

#### TORT LAW

The final section of this survey tackles cases centered on tort issues, which continues to be the most-litigated aspect of sports law. As a general matter, tort law governs the duties of care that event organizers and facility owners

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151. 200 P.3d 232 (Wash. 2009).



and operators owe to participating athletes and spectators, as well as the duties that athletes owe to each other. However, these duties have been limited by courts, which have traditionally been unwilling to impose liability for the risks inherent to both participants and spectators in each sport. Thus, in certain situations, only conduct that unreasonably increases inherent risks or amounts to recklessness will be actionable. The following cases provide a sample of the different types of torts that can apply in the sports context, including a potentially pioneering case that dares to question the “baseball rule.”

*Abato v. County of Nassau*<sup>152</sup>

The County of Nassau, the property manager of the Nassau Veterans Memorial Coliseum, and the Long Island Industrial Hockey League (LIHHL) appealed a trial court’s decision to deny their motion for summary judgment on negligence claims. A spectator at a LIHHL game brought these claims after she suffered injuries after other spectators ran her over in a scrum for a souvenir T-shirt tossed into the stands. The appellate court affirmed, holding the defendants failed to demonstrate they could not foresee the scrum or that it was a reasonably foreseeable consequence of attending the game. A concurring opinion emphasized that defendants could only use primary assumption of risk as a defense against injuries caused by inherent risks, and that the spectator did not know team employees might throw t-shirts into the stands because she had never attended a sporting event where that occurred.

*Ackerman v. Paulauskas*<sup>153</sup>

Assumption College and its athletic director moved for summary judgment on defamation claims brought against them by the school’s former men’s basketball coach after the athletic director made allegedly false statements to a local newspaper following the coach’s resignation. The comments could be construed to suggest the coach did not work long enough hours, did not have passion, did not project well in the community, and did not aid the school’s fundraising efforts. The court denied the motion, holding the coach did not have to demonstrate that the defendants made the comments with actual malice because he was not a limited purpose public figure. It emphasized the coach did not participate in any controversy that gave rise to the alleged defamation, regardless of the number of times he was quoted by the local newspaper during his tenure.

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152. 886 N.Y.S.2d 218 (App. Div. 2009).

153. 25 Mass. L. Rep. 527 (Super. Ct. 2009).

*Baker v. Major League Baseball Props.*<sup>154</sup>

Major League Baseball (MLB), MLB Properties, the MLB Players' Association, the San Diego Padres, and the World Baseball Classic, Inc. (WBC) moved to dismiss negligence and premises liability claims brought against them by a spectator at the 2006 WBC Championship Finals after he suffered a severe leg injury when he fell in a parking lot at PETCO Park. The spectator alleged that all five defendants were responsible for the management of the lots surrounding the stadium, some of which were used to house attractions relating to the WBC. Those lots included several raised surfaces, in which there were no signs indicating the presence of a possible hazard. The spectator was walking through the attractions when he unknowingly stepped off a curb onto the parking surface and landed on his knee. The court granted the motion in part and denied it in part, noting that there was no state law imposing strict premises liability, but holding that the spectator's allegations were sufficient to state a claim for negligence. In assessing that claim, the court emphasized that owners and occupiers of land are not relieved of all duties merely because a hazard is open and obvious. Although such hazards may obviate the duty to warn, they may still have to remedy the danger if it is foreseeable that injuries could occur. The court noted that the reasonable anticipation that the WBC attractions could distract spectators may have increased the necessity to take extra precautions.

*B.R. v. Little League Baseball, Inc.*<sup>155</sup>

A Little League baseball player appealed a trial court's decision to grant summary judgment to the Little League Baseball (LLB) national organization on negligence claims brought against it by the player after one of his local league's employees, who was also a registered high-risk sex offender, molested him on multiple occasions. The molestations took place at the local league's facility, but not during its sponsored activities. The sex offender had been involved with the league for a number of years, first as a volunteer umpire, and later as a team manager and coach. The league eventually hired him as the league's umpire-in-chief, a paid position. LLB has an operating manual and regulations for local leagues to follow, but they do not give the organization control over their day-to-day operations. Each local league is responsible for selection and supervision of its volunteers and employees. Although the operating manual recommended that local leagues conduct background checks on those individuals, it did not require those checks when

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154. No. 09cv982-WQH-CAB, 2009 U.S. Dist. LEXIS 81982 (S.D. Cal. Sept. 8, 2009).

155. No. E045946, 2009 Cal. App. Unpub. LEXIS 7652 (Cal. App. Sept. 24, 2009).

the events giving rising to this lawsuit took place. The local league did not require its volunteers or employees to fill out a written application or undergo a background check when the sex offender became involved with the program. The appellate court affirmed, holding the molestations were not the proximate cause of LLB's breach of its duty to screen and supervise local officials for the benefit of the participants. The court emphasized that public policy considerations precluded the player's claims when the connection between the offensive acts and the LLB's breach were too attenuated. It also noted that the player was seeking to impose liability on an organization that merely chartered local leagues, and that the molestations took place on occasions well after a local league's activities had concluded.

*Brush v. Jiminy Peak Mountain Resort, Inc.*<sup>156</sup>

A ski area operator, collegiate ski competition organizers, and the competition's race referee and International Ski Federation (FIS) technical delegate moved for summary judgment on negligence and gross negligence claims brought against them by collegiate skier Kelly Brush after she suffered injuries when she lost control during the race and collided with a ski lift stanchion located just off the trail. The competition was held under the auspices of the United States Ski and Snowboard Association (USSA) and the FIS; therefore, all competitors had to be members of the national governing body. Brush's mother had filled out registration forms for both organizations the previous summer, and the USSA form included a clearly-labeled waiver purporting to release it and its associated entities from negligence liability for any injuries suffered in connection with any activities in which the USSA was involved. Both the ski area operator and competition organizers were parties to an agreement with the USSA that required them to assure the facilities conformed to the applicable rules and the requirements of the competition's jury. Under National Collegiate Athletic Association and USSA rules, a jury had to inspect the layout of the trail prior to its use in a race. In this case, the competition jury was comprised of two individual organizers, the race referee, and the technical delegate. The rules also required the trails to meet relevant FIS regulations, set forth in relevant "homologation" reports. However, netting was not set up according to the diagram included in the "homologation" report for the trail used in Brush's race. More importantly, no nets were installed around the lift tower, and neither the tower nor its supporting stanchion was equipped with padding regularly used in ski events.

The court granted the motion, holding that the Massachusetts ski safety

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156. 626 F. Supp. 2d 139 (D. Mass. 2009).

statute barred Brush's negligence claim against the ski area operator and the USSA waiver barred her negligence claims against the competition organizers and officials. The court also concluded that no reasonable jury could find that the defendants' alleged conduct rose to the level of gross negligence because there was no evidence their actions amounted to anything more than simple advertence. In dismissing the negligence claim against the ski area operator, the court emphasized that state law made skiers responsible for any injuries resulting from skiing off the trail and did not place a duty on operators to provide netting or padding around obstacles in those areas. The court also noted that the operator did not contractually obligate itself to provide specific safety measures, only to work with others to ensure the facilities were prepared according to the applicable rules. In dismissing the negligence claims against the organizers and officials, the court found the waiver's language clear and unambiguous and that it could not constitute a contract of adhesion because recreational activities are not essential public services.

*Carter v. Baldwin*<sup>157</sup>

Off-road racer Phil Carter appealed a trial court's decision to dismiss a gross negligence claim that he brought against the promoters of an event after lack of adequate emergency medical care at the track allegedly exacerbated injuries he suffered in a collision with another car. The appellate court affirmed, holding the promoters did not breach any duty they owed to Carter because he assumed the risk of injury from the risks inherent in the sport. The court noted that the alleged lack of proper medical care may have increased the severity of the injury, but Carter did not claim the promoters increased the risk a collision would occur. The court did not address whether the promoters had a duty to provide reasonable medical care on the premises.

*Clemens v. McNamee*<sup>158</sup>

The former trainer of former professional baseball player Roger Clemens moved to dismiss defamation claims brought against him by Clemens on both procedural and substantive grounds. In the alternative, he sought to transfer the litigation to New York. During conversations that took place in or around Clemens's hometown of Houston, Texas, Brian McNamee allegedly told one of Clemens's teammates that Clemens used human growth hormone and steroids. Later, federal authorities investigating illegal steroid use summoned

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157. No. D052696, 2009 Cal. App. Unpub. LEXIS 529 (Cal. App. Jan. 22, 2009).

158. 608 F. Supp. 2d 811 (S.D. Tex. 2009), *motion to reconsider denied by*, 638 F. Supp. 2d 742 (S.D. Tex. 2009).

McNamee to New York where he allegedly told them he had injected Clemens with those drugs within the state. The authorities asked the trainer to speak with the Mitchell Commission, which was investigating the use of performance-enhancing drugs in Major League Baseball (MLB). The Mitchell Commission's investigation was not associated with the government's investigation, but McNamee repeated his allegedly false statements to that body and they were later published in a report to MLB Commissioner Bud Selig. After that report was released to the public, McNamee also spoke with an online reporter at his home in New York, where he repeated his statements once more. They were subsequently published in an online article.

The court granted the motion in part and denied it in part. First, it held it could not exercise personal jurisdiction over the claims based on McNamee's alleged statements to the Mitchell Commission and the online reporter because those remarks did not mention Texas, were not made by an individual based in Texas, and were focused on drug use that took place in New York while Clemens was playing for a New York team. Therefore, they were likely to attract the attention of Clemens's fans both in and outside of Texas. The court also determined McNamee was immune from liability for his statements to the Mitchell Commission because he had to make them to avoid being targeted by the government's investigation. However, the court refused to dismiss the claims based on McNamee's alleged statements to Clemens's teammate under the statute of limitations because a reasonable jury could find that Clemens only recently discovered McNamee had spoken to the teammate about the alleged drug use. The court noted Clemens had subsequently participated in or overheard conversations involving the teammate in which drug use came up, but it could not conclude that they put Clemens on notice that the statements had been made. The court allowed Clemens to amend his complaint to provide the exact statements made to the teammate. After determining that McNamee's statements did not rise to the level of defamation *per se*, the court also allowed Clemens to amend his complaint to present proof of actual damages. Because the only claims remaining were based on statements that occurred in Texas, the court determined it would not be in the interest of justice to transfer the case to New York.

Subsequently, the court denied Clemens's motion to reconsider the decision to dismiss the claims based on McNamee's alleged statements to the Mitchell Commission and its determination that the alleged statements to the teammate did not constitute defamation *per se*. The court held that McNamee should not be forced to explain how his alleged statements to the Mitchell Commission specifically furthered the government's investigation into illegal drug use or the government's specific motive for compelling him to speak in order to obtain immunity. It noted that McNamee had submitted an

uncontested affidavit from a federal investigator that generally outlined the reasoning behind the government's action. The court also reiterated its view that McNamee's alleged statements to Clemens's teammate did not clearly articulate that Clemens was committing a crime. Finally, the court refused to exercise "pendent" personal jurisdiction over the claims based on McNamee's statements to the Mitchell Commission or the online reporter because they were made to different audiences at different times and in vastly different contexts.

*Cooper v. Unthank*<sup>159</sup>

Two high school basketball players and their mothers appealed a trial court's decision to grant summary judgment to a church and its in-house academy on claims brought against them by the players and their mothers after the academy's volunteer girls' basketball coach induced one of the players into a sexual relationship and sexually assaulted the other. Shortly after he was hired, the coach began calling one of the players and driving her home after practice. The player's mother believed the contact between her daughter and the coach was inappropriate and informed the school's principal, who assured her that the coach would be supervised. The principal then met with the coach and told him to stop calling and giving rides to the players. But one week later, the coach and player had the first of two sexual encounters. Between those encounters, the team had a road game. Following that game, the coach lured another player into the school's van and assaulted her. However, he denied that an assault took place. Other members of the squad testified the coach had made several sexual advances toward individual players, and one player had informed the principal she suspected the coach was engaging in a sexual relationship with her teammate before it actually happened.

The appellate court affirmed in part and reversed in part, holding there was a genuine issue of material fact as to whether the academy had negligently retained the coach following reports of his conduct, but that there was no evidence of intent to inflict emotional distress that could sustain a claim for outrage. After assessing the negligence claim, the court emphasized that a jury should determine whether it was foreseeable that the coach would sexually abuse the players. It noted that both members of the team and one of the mothers had warned the principal that the coach was engaging in inappropriate behavior. Although the principal had reprimanded him on one occasion, a jury could still conclude that her knowledge of his behavior made his subsequent action foreseeable and required additional action to prevent it.

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159. No. 2007-CA-002576-MR, 2009 Ky. App. Unpub. LEXIS 883 (Ky. App. Oct. 16, 2009).

*Corona v. State*<sup>160</sup>

A boxing referee and his wife appealed a trial court's decision to dismiss mandatory duty claims that they brought against the State of California, its Department of Consumer Affairs, and its State Athletic Commission (SAC) after the SAC licensed a boxer to compete in a match supervised by the referee without proof he had tested negative for HIV. Following the match, the SAC's executive director notified the referee that the fighter had tested positive at some point in time, and that he needed to take precautions just in case he was exposed to the disease. However, the referee had already engaged in unprotected sex with his wife. The appellate court reversed, holding the defendants were not entitled to governmental immunity because the SAC had a mandatory duty to ensure that all boxers provided a negative HIV test before being licensed. The court emphasized that the state statute governing boxing licensing did not give the SAC any discretion to waive the requirement, noting its language made testing a condition precedent to approval. It also found that the statute imposing liability for mandatory duties trumped another statute granting licensing immunity, which was intended to protect only discretionary activity.

*Correa v. City of New York*<sup>161</sup>

The New York Yankees appealed a trial court's decision to deny the team's motion for summary judgment on a negligence claim brought against it by one of its security guards after he suffered injuries during a game when a foul ball that snuck through a window in the screen behind home plate struck him. The window had been opened to allow for the placement of a television camera, but the employee of a third-party defendant failed to secure the netting around it. The appellate court affirmed, holding that the limited duty "baseball rule" did not bar the guard's claim because there was a genuine issue as to whether the screen behind the plate was sufficient to provide adequate protection to the individuals seated behind it. The court found that the Yankees failed to establish the club did not retain the third-party defendant and that, even if he was not, the team had a non-delegable duty to provide its employees with a reasonably safe place to work. The court also emphasized that there was a genuine issue as to whether ballpark employees could assume the risk that a proprietor would expose them to risks of injury beyond those inherent to the average spectator.

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160. 100 Cal. Rptr. 3d 591 (Ct. App. 2009).

161. 890 N.Y.S.2d 461 (App. Div. 2009).

*Crespin v. Albuquerque Baseball Club, L.L.C.*<sup>162</sup>

The parents of a spectator at an Albuquerque Isotopes minor league baseball game appealed a trial court's decision to grant summary judgment to the Isotopes, the City of Albuquerque, the Houston Astros, and Matranga, an Astros minor league player on negligence claims brought against them by the spectator after he suffered injuries when he was struck in the head by a homerun hit by the player during batting practice. The spectator was sitting at a picnic table in an unscreened area beyond the left field wall, participating in a pre-game Little League party. The picnic tables were situated so that the spectators were not facing the field, and batting practice began without a warning. The stadium included protective netting behind home plate, but no other area of the stands was screened.

The appellate court affirmed the decision on the claims brought against the Astros and Matranga, but reversed the decision on the claims brought against the Isotopes and the city. In assessing the claims against the latter defendants, the court declined to adopt the limited duty "baseball rule," under which stadium owners and operators satisfy their duty of care to spectators by offering screened seating behind home plate that is sufficient to provide protection to as many spectators as may reasonably be expected to desire it in the course of an ordinary game. Instead, the court followed the minority's approach, holding the team and the city owed a general duty of reasonable care to all spectators, and whether they breached that duty should depend on the facts and circumstances in each case. The court found that there was no compelling reason to adopt the "baseball rule" under the state's comparative negligence regime, which could take into account the usual risks that spectators assume when they attend games. Applying traditional tort law principles, the court deemed summary judgment inappropriate, emphasizing that a jury should determine whether the defendants breached their duty to the spectator by failing to screen the picnic area or warn that batting practice was underway.

*Cusumano v. U.S. Over Thirty Baseball League*<sup>163</sup>

A recreational league baseball player appealed a trial court's decision to grant summary judgment to the league and enter judgment on a jury verdict in favor of an opposing team and its coach on negligence claims brought against them by the player after he suffered a severe foot injury when a "throw down" base moved when he stepped on it during a game at a local public high school.

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162. 216 P.3d 827 (N.M. Ct. App. 2009).

163. No. A-4771-07T2, 2009 N.J. Super. Unpub. LEXIS 2217 (App. Div. Aug. 13, 2009).



The league was responsible for scheduling and assigning venues for all of its games, but was not responsible for obtaining use permits or supervising the contests. In the game at issue, the opposing team's coach provided the bases; however, he did not monitor how they were placed on the diamond. Although "throw down" bases were common in league games, the venue was designed to use "fixed" bases. In fact, the league had previously purchased "fixed" bases for the field. But at the time of the game, they were in possession of the coach of another team that primarily played its home contests at the school. As a result, the iron spikes to which those bases attached were left exposed, and the plaintiff's foot struck one when a substitute "throw down" bag moved. He stumbled and broke his other foot trying to catch his balance. The appellate court affirmed, holding the league owed no duty to the player to ensure teams used proper bases on the fields. The court emphasized that the league's teams were responsible for setting up the field, and that the league did not supervise the games. Although the league may have purchased and provided "fixed" bases for the venue at issue, the court noted that the teams determined which type of bases to use.

*Cyprien v. Bd. of Supervisors for the Univ. of La. Sys.* <sup>164</sup>

The Board of Supervisors for the University of Louisiana System, the University of Louisiana-Lafayette (ULL) athletic director, and another ULL employee appealed an appellate court's decision to affirm the denial of their motion for summary judgment on claims brought against them by Glynn Cyprien after ULL revealed that he had misrepresented his educational qualifications on his resume and rescinded his contract to coach the ULL men's basketball team. Cyprien alleged that he had delivered a correct copy of his resume when he interviewed for the job, but a copy faxed to the school by a student working for his former employer indicated that he had received a degree from an accredited university. In reality, Cyprien had not received a degree, one of the prerequisites to coaching at ULL.

The Louisiana Supreme Court reversed, holding that the Board of Supervisors, the athletic director, and the ULL employee did not commit defamation or breach Cyprien's coaching contract with the school. The court determined the defendants did not make any false accusations when they revealed that Cyprien had submitted a false resume and that they had good cause to rescind his contract if he did not actually qualify for the position he was hired to fill. It emphasized there was no reason for Cyprien to have a false resume on file at his previous school and ULL would not have entered

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164. 5 So. 3d 862 (La. 2009).

into the contract had it known he did not possess the required degree.

*Elie v. City of New York*<sup>165</sup>

The St. Louis Cardinals moved for summary judgment on a negligence claim brought against the team by a spectator at a minor league baseball game after he suffered injuries when he was struck by a baseball bat propelled into the stands by a player on one of the franchise's former short-season Class "A" affiliates. The spectator was sitting approximately ten feet from the player when the player lost control of the bat while allegedly horsing around during warm-ups. The court granted the motion, holding the team did not breach any duty it owed to the spectator because he assumed the risk of injury from the risks inherent in the event. The court emphasized that almost all spectators consent to the danger that a loose bat may end up in the stands, regardless of when or how that result occurs. This view is consistent with the limited duty "baseball rule," under which a team's duty to protect spectators is fulfilled by providing screening behind the plate.

*Esshaki v. Millman*<sup>166</sup>

Basil Esshaki appealed a trial court's decision to grant summary judgment to Scott Millman on Esshaki's tort claims, which arose out of injuries he suffered when struck in the face by Millman while competing in a recreational league soccer game. The appellate court affirmed in part and reversed in part, holding that there was a genuine issue as to whether Millman committed a battery or engaged in reckless conduct, but there was no question on Esshaki's claim for intentional infliction of emotional distress. In assessing the battery claim, the court found that the testimony of the Esshaki and the game's referee was sufficient to support a finding that Millman intentionally struck Esshaki with his fist or elbow, and that the action was not within the scope of assumed risks within the sport. The court also believed the referee's testimony could support a recklessness claim because a jury might find Millman threw out his elbow only in frustration, but in a manner evincing a conscious disregard for the safety of Esshaki, who was standing next to him. However, the court dismissed the claim for intentional infliction of emotional distress because the problems Esshaki encountered after the incident were not sufficiently severe.

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165. No. 20244/03, 2009 N.Y. Misc. LEXIS 2256 (Sup. Ct. Aug. 19, 2009).

166. No. 283297, 2009 Mich. App. LEXIS 582 (Mich. App. Mar. 17, 2009).

*Farrell v. Hochhauser*<sup>167</sup>

A school district and two high schools appealed a trial court's decision to deny their motion for summary judgment on claims brought against them by a wrestler that competed for one of the schools after he contracted herpes while participating in a match against a student that competed for the other school. The appellate court reversed, holding that neither the district nor the schools breached any duty they owed to the wrestler because he assumed the risk of injury from the risks inherent in the sport. The court noted wrestling involves close contact between participants, and that both the wrestler's coach and own trial expert admitted the possibility of contracting a disease through skin-to-skin contact was well-known by the sport's participants. It also emphasized that the wrestler was aware skin diseases could be passed in competition, and the district had informed him, both orally and in a packet that was distributed prior to the start of the season, of the specific risk of contracting herpes.

*Godfrey v. Iverson*<sup>168</sup>

Professional basketball player Allen Iverson appealed a district court's judgment on a jury verdict in favor of Marlin Godfrey on the negligent supervision claim he brought against Iverson after he suffered injuries in a nightclub brawl when Iverson's bodyguard attacked him while Iverson stood by and watched. The D.C. Circuit affirmed, holding Godfrey did not have to establish the standard of care that Iverson owed to him through expert testimony because Iverson was present during the attack. Therefore, a jury could find that he had the ability to supervise and control his bodyguard's behavior, unlike other cases where supervisors were not present, necessitating experts to evaluate if they had properly trained security personnel.

*Hansen Beverage Co. v. Innovation Ventures, L.L.C.*<sup>169</sup>

Professional football player and Innovation Ventures, L.L.C. (Innovation Ventures) spokesman Braylon Edwards moved to quash a subpoena *duces tecum* that he was served by the Hansen Beverage Company (Hansen) in its suit against Innovation Ventures for false advertising under the Lanham Act. Innovation Ventures produced 5-Hour Energy, a product that Edwards endorsed in a television commercial. The court granted the motion, holding that Hansen had not proven Edwards's deposition or compensation agreement

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167. 884 N.Y.S.2d 261 (App. Div. 2009).

168. 559 F.3d 569 (D.C. Cir. 2009).

169. No. 2:09-mc-50356, 2009 U.S. Dist. LEXIS 46217 (E.D. Mich. June 2, 2009).

with Innovation Ventures was reasonably calculated to lead to the discovery of admissible evidence that would justify the burden imposed on Edwards if he was compelled to comply. The court noted Edwards was not subpoenaed because of any special information that he had or to contest the truth of his statements, but only to testify about his experience using the product. The court emphasized that Edwards had never indicated that other users would feel the feelings he felt using the product; thus, the only information that Hansen could obtain was available by less-intrusive means. The court also noted that Edwards's personal experience was irrelevant because it said little about the product's aggregate effects on all of its users.

*Jackson v. Balanced Health Prods., Inc.*<sup>170</sup>

Dietary supplement retailers and the manufacturer of an over-the-counter weight-loss supplement called "StarCaps" moved to dismiss claims brought against them by professional football player Grady Jackson and another individual after the NFL suspended Jackson for four games for taking the supplement, which contained a prescription drug that was banned by the league. The manufacturer sold and marketed StarCaps as an all-natural supplement, but an academic journal later discovered that it contained the banned diuretic. Although the manufacturer stated that it had suspended shipping the supplement to its retailers, those retailers continued to sell StarCaps until the manufacturer issued a voluntary recall. The retailers also claimed to have quality control procedures to ensure that the products that they received from vendors met certain standards. The court granted the motion in part and denied it in part. Relying on a recent U.S. Supreme Court decision, the court emphasized that none of the plaintiffs' claims were pre-empted by the federal Food, Drug, and Cosmetic Act (FDCA). However, the court held that the plaintiffs' state law claims for strict product liability and negligence were barred by the economic loss rule, which limits damages to physical harm, and that their Sherman Act claim was precluded because no private right of action existed to enforce it.

*Jamgotchian v. Slender*<sup>171</sup>

Race horse owner Jerry Jamgotchian appealed a trial court's decision to grant summary judgment to racing steward George Slender on Jamgotchian's claim Slender committed a trespass to chattels when he allegedly prevented the owner from removing one of his horses from a racetrack's grounds prior to

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170. No. C 08-05584 CW, 2009 U.S. Dist. LEXIS 48848 (N.D. Cal. June 10, 2009).

171. 89 Cal. Rptr. 3d 122 (Ct. App. 2009).

a race causing the horse to subsequently come up lame in the event. Jamgotchian attempted to get permission to remove the horse from the race that morning, but the stewards unanimously voted to turn down his request because he made it after the previously designated scratch time. Slender did not tell the other stewards that Jamgotchian wanted to scratch the horse so it could run in a stakes race, which an owner can do without permission, or that the track's racing department would accept the scratch. After the stewards' vote, Slender ordered California Horse Racing Board investigators and racing security staff to prevent Jamgotchian from removing the horse.

The appellate court reversed, holding that Slender was not immune from liability under state law, and that Jamgotchian had raised genuine issues as to whether Slender intentionally interfered with his right to possess his horse and whether the alleged interference was a proximate cause of the horse's injuries. In assessing whether Slender was automatically entitled to immunity, the court determined he would not be engaging in a proper exercise of discretion if he ordered a horse to race and took steps to prohibit its removal because those actions were not among the disciplinary measures authorized under state regulations. The court also emphasized that quasi-judicial immunity was only available for judges acting in their judicial capacity and that Slender's alleged conduct was outside the scope of his authority.

*Klutman v. Sioux Falls Storm*<sup>172</sup>

An Indoor Football League team appealed a trial court's judgment on a jury verdict in favor of a teenage boy and his parents on a negligence claim they brought against the team after the boy suffered devastating knee injuries while playing an informal game of touch football during a preseason promotional event. The team invited all children in attendance at the event to participate in the game, but did not require them to sign waivers or warn them about the condition of the field. During the game, the boy's foot allegedly got caught in a gap between two pieces of the synthetic turf that covered the field, causing permanent injuries. The team did not have an established protocol for ensuring proper installation of the turf, even though it was common for gaps to exist. During trial, the team president admitted the franchise began taping the seams in the turf the following season; however, a team trainer claimed the team also used tape during games prior to the incident. The president had also previously sought funding for new turf because its current turf endangered players.

The South Dakota Supreme Court affirmed, holding there was no abuse of

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172. 769 N.W.2d 440 (S.D. 2009).

discretion in the decisions made at trial, and the evidence was sufficient to support the jury verdict. First, the court determined there was no error in preventing a chemical engineer secured by the team from testifying as to his opinion about the cause of the boy's injuries. It noted that the engineer could be considered an expert on issues related to the synthetic turf, but had no training, education, or experience in medical matters. The court also emphasized that the boy's treating surgeon admitted he could not tell exactly how the injuries happened. Second, the court found there was no error in refusing to issue a jury instruction on contributory negligence, noting there was no open and obvious danger that the boy should have avoided. It emphasized that the team itself was arguing there was no gap in the turf that could have caused the injuries. Third, the court determined there was no error in allowing the plaintiff to impeach the testimony of the team's president with evidence showing the team had subsequently taped the seams in the turf. It noted that evidence of subsequent remedial measures is admissible when offered to impeach and, more importantly, that the team's actions did not actually constitute a remedial measure because the team had taped the seams on prior occasions. Fourth, the court held that there was no error in denying a motion for a new trial because the record did not contain the evidence needed to show the boy's injuries may not have been as severe as the plaintiffs articulated. Finally, the court concluded that the evidence was sufficient to support the verdict because (1) the team failed to warn the game's participants about the condition of the turf; (2) the turf had a tendency to separate; (3) there was no protocol for monitoring the condition of the turf; (4) the team had labeled the turf dangerous when seeking a new field from the city; and (5) the seams in the turf were not taped during the event.

*Midwest Employers Cas. Co. v. Harpole*<sup>173</sup>

An insurance company appealed a trial court's decision to grant summary judgment to five high school football officials on negligence claims brought against them by the company after high school football coach Terry English suffered injuries when one of the referees collided with him in a restricted area along the sidelines during a game. The company paid workers' compensation benefits to English and filed a lawsuit as his subrogee. School district rules prohibited coaches and players from being in the restricted area while the ball was in play. The appellate court affirmed, holding that the referee that collided with English did not breach any duty he owed to the coach because the incident took place in the midst of a play while the referee was performing

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173. 293 S.W.3d 770 (Tex. App. 2009).

his job. The court emphasized the referee had to focus on the football field and not look for coaches in the restricted area. Relying on the school district's rules, the referee could not have anticipated the encroachment by English while he was sprinting down the sidelines. The court also held that the referees, as a unit, did not breach any duty that they owed to English because there was no evidence to support the company's contention that they allowed coaches to move into the restricted area while the ball was in play. In fact, the referees continually instructed both the coaches and the players to stay out of the area.

*Milne v. USA Cycling, Inc.*<sup>174</sup>

A bicycle race participant and the mother of another race participant appealed a district court's decision to exclude their expert's opinion on organizing and supervising races and then dismiss the gross negligence claim that they brought against the race's organizers, promoters, and supervisors after the participants were struck by a vehicle during the race, causing serious injuries to the first participant and killing the second participant. Although the majority of the race took place on off-road paths, the first six miles were conducted on an "open course" road that participants shared with vehicles, and it was on this opening stretch that the accident occurred. However, the entire race was governed by mountain bike racing rules adopted by USA Cycling, and those rules did not prohibit participants from crossing the center-line of a road. "Open course" races were also common in mountain bike racing, and the first participant admitted that roughly one quarter of the races in which he had competed were of this variety. The race at issue included an "open course" stretch at least the previous seven times it was conducted and no bicycle-vehicle accident had ever occurred. Both of the participants were considered expert racers with a significant amount of mountain bike racing experience. They had competed in the race in prior years and were familiar with the course that was used. Prior to the race, they signed forms that purported to release the race organizers from liability for negligence and warned all participants that they assumed the risk of colliding with a vehicle. Nevertheless, race organizers took additional precautions to avoid the risk of an accident, including: (1) posting warning signs; (2) having attendants warn drivers in the area on the day of the race; (3) posting marshals throughout the course to supervise the event; and (4) ensuring there was personnel available to administer aid to injured participants. The accident occurred on a section of the course that was straight and wide, and the driver's vehicle was visible from

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174. 575 F.3d 1120 (10th Cir. 2009).

at least thirty yards away.

The Tenth Circuit affirmed, holding there was no abuse of discretion in excluding the plaintiffs' expert testimony on the standard of care in mountain bike racing, and that no reasonable jury could conclude that the race organizers were grossly negligent. In assessing the decision to exclude the expert testimony, the court found that the expert was not qualified to render an opinion on the care that race organizers owed to participants, noting that he was not an experienced mountain bike racer and his experience in supervising races on paved roads was not sufficient to provide him with expertise on the vastly different practices and rules used in the sport. Even if he was qualified, the court concluded that his opinions were unreliable because they were not based on studies analyzing the precautionary measures taken in mountain bike racing and the risks and benefits of those measures. After determining that federal law dictated the standard needed to grant summary judgment on the gross negligence claim, the court concluded that there was no evidence to suggest that the defendants were indifferent to the possibility that an accident might occur. It emphasized that the organizers took a number of precautions designed to prevent accidents, and that the lack of problems in the past showed there was no serious risk of one occurring.

*Noffke v. Bakke*<sup>175</sup>

Former high school cheerleader Brittany Noffke appealed an appellate court's decision to affirm in part and reverse in part the grant of summary judgment to teammate Kevin Bakke and the Holman Area School District on a negligence claim brought against them by Noffke after she suffered injuries when she fell on a tile floor during a stunt because Bakke failed to spot her. Both Bakke and the school district also appealed the appellate court's decision. The Wisconsin Supreme Court affirmed in part and reversed in part, holding that both Bakke and the school district were immune from negligence liability under state law, and that Bakke's acts were not reckless as a matter of law. The Court found Bakke was immune from negligence liability because both he and Noffke were engaged in a sport involving amateur teams that included physical contact between the participants. It concluded he could not be liable for recklessness because his acts did not evince a conscious disregard for Noffke's safety. In assessing whether vicarious liability could be imposed for the high school cheerleading coach's failure to require a second spotter or use mats, the Court determined that the school district was immune because those acts arose out of discretionary decisions, and that the danger involved in

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175. 760 N.W.2d 156 (Wis. 2009).



performing the stunt was not so known and compelling as to give rise to a ministerial duty to provide the additional protection.

*NPS, L.L.C. v. StubHub, Inc.*<sup>176</sup>

StubHub, Inc. (StubHub) moved for summary judgment on the claim for tortious interference with advantageous relations brought against it by the New England Patriots as part of the team's lawsuit against the online ticket broker for allegedly inducing the team's season ticketholders to breach their agreement not to resell their tickets. The consequences for breaching the agreement were printed on the back of the tickets and included the team's right to revoke the privilege of using them. However, Massachusetts law also prohibited individuals or entities from reselling tickets for more than two dollars above face value. The broker alluded to the law and other state regulations on its website and required any person who wished to sell tickets to comply with them. The Patriots prevented season ticketholders from using online ticket brokers because they had more fans who wanted to buy season tickets than tickets available and wanted to monitor who was sitting in the team's seats in order to deter unruly behavior. To cater to its prospective buyers, the club established a waiting list. For a \$100 deposit, fans could join the list and get access to the team's online ticket exchange forum, which allowed them to buy seats to individual games from current season ticketholders. Neither the Patriots nor the ticketholders profited from the exchanges, but the broker earned a twenty-five percent commission from each sale on its website: fifteen percent of the sale price from the seller, and another ten percent added to the sale price from the buyer. In exchange for their customers' loyalty, the broker also offered top sellers extended privileges, including the ability to purchase underpriced tickets with no buy-side fee. It also gave all buyers a guarantee that StubHub would honor the tickets. However, buyers had to obtain independent confirmation that the tickets were invalid before they were entitled to a refund.

The court denied the motion, holding that the Patriots had provided sufficient evidence for a jury to find that (1) the team had advantageous relationships with both its current and prospective season ticket holders; (2) the ticket broker's interference with those relationships was improper in means; and (3) the team was harmed by that interference. In assessing whether the team had advantageous relationships, the court found that the Patriots may have had a reasonable expectancy of financial benefit from the prices that both current ticket holders and waitlist members would pay for

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176. 25 Mass. L. Rep. 478 (Super. Ct. 2009).

season tickets. In assessing whether the ticket broker's interference was improper, the court emphasized that the broker's conduct had to violate a state statute or common-law tort, but found that StubHub may have induced or encouraged current ticket holders to violate the state's anti-scalping law or profited from those violations while positioned to stop them. Although the language on the broker's website suggested it did not knowingly aid in breaking the law, the court emphasized that its pricing structure allowed for it to profit more when the sellers exceeded the two-dollar threshold and that the broker did not require or even ask those sellers to reveal the face value of the tickets. The court also noted that a jury could infer that the broker encouraged its top sellers to buy underpriced tickets so they would resell them at higher prices and StubHub could profit from a higher commission. In assessing whether the Patriots suffered any economic injuries, the court concluded that a loss of goodwill among current and prospective season ticket holders was merely speculative, because there was no evidence suggesting that the broker's buyers were more unruly than other fans or that more individuals would seek to buy season tickets if more tickets were available through the team's online forum. However, the court found that the team may have suffered increased administrative costs because the team's personnel had to deal with several of the broker's buyers whose tickets were declared invalid.

*Parrish v. Nat'l Football League Players Inc.*<sup>177</sup>

National Football League Players Inc., the fully-integrated marketing company of the NFL Players' Association, moved for judgment notwithstanding a verdict in favor of a class of retired NFL players on the class's claim that the company breached a fiduciary duty to promote and market members of the class. Class members had signed a group license agreement with the company with the hope of earning royalties for the use of their names and likenesses. The court denied the motion, holding the evidence was sufficient to support the verdict because the jury could have believed the company undertook a fiduciary duty but made no effort to promote or market the retired players. In fact, the jury could have found the company's true motive was to create an illusion of representation so that no other company would attempt to sign them. The court emphasized the company had not paid a single cent to any retired players under the program despite fourteen years of lobbying efforts to get them to sign the agreements. It also noted that the company kept a larger share of the money generated in marketing active players. In assessing whether the company had a fiduciary duty, the court

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177. No. C 07-00943 WHA, 2009 U.S. Dist. LEXIS 4239 (N.D. Cal. Jan. 13, 2009).

noted that the company did not pay the retired players anything to sign the agreements; thus, they could have reasonably expected efforts to market them in order to receive compensation.

*O'Connor v. Syracuse Univ.*<sup>178</sup>

The father of a Syracuse University (Syracuse) hockey player appealed a trial court's decision to grant summary judgment to Syracuse, Slippery Rock University (SRU) of Pennsylvania hockey player Matthew DiSanti, and Syracuse student Brian McNeil on negligence claims that he brought against them after he suffered injuries when he attempted to keep McNeil from being pulled out of the stands and into a group of SRU players by DiSanti following a game between the schools. The SRU players were waiting in a pathway between the ice and the visitors' locker room at Syracuse's home arena when DiSanti shouted at McNeil, starting a physical altercation along the barrier between the pathway and the stands. During the fracas, DiSanti grabbed McNeil and attempted pull him into the pathway. At that point, the plaintiff, who was standing next to McNeil, grabbed the student around the waist to try to keep him out of danger. However, SRU players pulled both McNeil and the plaintiff across the barrier and piled on them. Although those players only struck McNeil, he escaped relatively unscathed, while the plaintiff broke his ankle and shinbone. The entire altercation, which lasted only a few seconds, was quickly broken up a Syracuse officer.

The appellate court affirmed in part and reversed in part, holding there was no evidence Syracuse breached any duty it owed to the plaintiff, but that there was a genuine issue as to whether the "rescue" doctrine allowed the plaintiff to recover against DiSanti and McNeil. In assessing the negligent supervision claim against the school, the court emphasized that Syracuse owed the plaintiff a duty to exercise reasonable care in attempting to maintain safe conditions at the arena, which included the obligation to minimize foreseeable dangers arising from the acts of third parties. However, that duty did not extend to protect spectators from the side effects of unexpected assaults, which is how the court characterized the altercation at issue. The court also noted that the school followed its written policies by requiring the use of barriers and stationing safety officers in the pathway, even though there had never been a physical confrontation between a player and a spectator. After assessing the claims against DiSanti and McNeil, the court determined it was fair to infer that the plaintiff's motive in restraining McNeil was to keep him out of imminent danger. It emphasized that the "rescue" doctrine could apply

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178. 887 N.Y.S.2d 353 (App. Div. 2009).

regardless of whether the danger materialized, as long as the plaintiff's beliefs were reasonable. Based on the surrounding circumstances, the court concluded that it was reasonable for the plaintiff to believe that McNeil was in trouble.

*Podgorski v. Pizzoferrato*<sup>179</sup>

The Town of Glastonbury, its board of education, its high school athletic director, and the school's lacrosse coaches moved for summary judgment on negligence claims brought against them by one of the school's lacrosse players after he suffered injuries when he was struck by a ball thrown by one of his teammates at the school's field house prior to a practice. As a general matter, the players were prohibited from tossing balls around while waiting to be taken to the field. However, they broke that rule almost every day, sometimes while a coach observed. The school's coaches' handbook did not include specific mandates related to field house conduct, but required coaches to "properly" supervise players at "practice." The plaintiff alleged that the lacrosse coaches not only failed to "properly" supervise the athletes, but also failed to supervise at all. The court denied the defendants' motion, holding that they were not entitled to governmental immunity because the coaches had a ministerial duty to supervise the teams during practice. It emphasized the policy in the school's coaches' handbook mandated some level of supervision, even if there was discretion as to what was "proper." The court noted the time between the players' arrival at the field house and the time they reached the field was within the scope of "practice" because they would not have been able to participate without changing their clothes and obtaining their equipment.

In an earlier decision in the same lawsuit, a rehabilitation provider and one of its physical therapists moved to dismiss apportionment claims brought against them by the defendant lacrosse player and his parents. The plaintiff alleged that those defendants had cleared him to attend practice even though he sustained a head injury during the school's previous game, and that the player threw the ball at him even though he was aware of that injury. The court granted the motion, holding state law disallowed apportionment liability between parties liable for negligence and parties liable for their intentional acts. It noted the plaintiff accused the rehabilitation provider and physical therapist of mere negligence, while the defendant player's act was clearly purposeful.

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179. No. CV075010288, 2009 Conn. Super. LEXIS 1886 (Conn. Super. July 15, 2009), *defendants' motion for summary judgment denied*, No. CV075010288, 2009 Conn. Super. LEXIS 2777 (Conn. Super. Oct. 7, 2009).

*Roe v. Doe*<sup>180</sup>

The Dallas Mavericks and Mavericks owner Mark Cuban moved to strike a defamation claim brought against them as part of a lawsuit filed by former Mavericks coach Don Nelson after they failed to make a severance payment they allegedly agreed to pay him in order to terminate his consulting contract with the team. The contract included a non-compete clause. After the parties reached the alleged oral agreement, the team sent Nelson a document suggesting the consulting contract remained valid, but the terms of his employment were amended. Nelson refused to sign that document and subsequently signed a contract to coach the Golden State Warriors. The Mavericks withheld the salary owed to him under the consulting contract and other deferred compensation, claiming he violated the non-compete provision. Nelson filed a claim against the team in arbitration, seeking to recover the compensation owed to him under the contract. But before the hearing, Cuban appeared as a guest on a Bay Area sports radio show and made a number of comments that incorrectly described the details of the team's contract dispute with Nelson and the coach's role in it. Cuban also allegedly sent emails with similar comments to newspapers throughout the world.

The court granted the motion, holding that Nelson's claim should be struck under the California anti-SLAPP statute because the comments were made in furtherance of Cuban's free speech rights in connection with a public issue, and Nelson was unable to establish a likelihood of success on the merits of his claim. The court found that Cuban's statements concerned an issue of public interest because the contract dispute involved individuals well-known in the National Basketball Association community and who occupied high-profile positions, and it had already received significant national attention and publicity. The court also noted that broadcasting the statements contributed to the public's discussion of the issue. It found that Nelson was not likely to succeed on the merits of his claim because an average listener would not have considered the comments assertions of objective fact and, as a limited public figure, Nelson could not show that the comments were more than an inaccurate characterization of the contract dispute. Put succinctly, the comments were not defamatory, and, even if they were, Nelson could not demonstrate that Cuban made them with actual malice.

*Special Olympics Fla., Inc. v. Showalter*<sup>181</sup>

Special Olympics Florida (SOF) appealed a trial court's judgment on a

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180. No. C 09-0682 PJH, 2009 U.S. Dist. LEXIS 59440 (N.D. Cal. June 30, 2009).

181. 6 So. 3d 662 (Fl. Dist. Ct. App. 2009).

verdict in favor of two developmentally-disabled athletes on claims that they brought against the nonprofit corporation after they suffered injuries when a volunteer sexually molested them in a parking lot prior to a practice for a bowling event. Practices for the event were scheduled to begin on Saturdays at 1:30 p.m., and athletes were told not to show up earlier than one-half hour prior to it. However, athletes routinely ignored this instruction, and volunteers often arrived early because they anticipated the need to provide supervision. On the day of the molestations, SOF had also scheduled physicals for some athletes at the bowling facility, starting at 10:00 a.m. The plaintiffs did not have physicals scheduled, but arrived early to socialize before practice. The volunteer had been the head bowling coach for fourteen years before quitting in 1994 after accusations of molesting another athlete and her sister arose. However, the SOF did not investigate those claims. In the ten years prior to the incidents at issue, the current bowling coach had also been notified that the volunteer had molested one of the plaintiffs on more than one occasion and that he took developmentally-disabled adults to and from his vehicle during organized dances. However, she accepted his denials of wrongdoing and did not warn anyone associated with SOF or the athletes' parents about any suspicions.

The appellate court reversed, ordering the trial court to direct a verdict for SOF on the athletes' state statutory and vicarious liability claims and a new trial on the athletes' negligence claim. In assessing the vicarious liability claim, the court emphasized that the volunteer was not acting within the scope of his agency at the time of the incident, because the conduct was not in furtherance of SOF's mission. Based on that finding, it also concluded that SOF did not violate any Florida statutes. However, the court held the negligence claim was viable because it sought to impose direct liability on SOF for breaching its duty to supervise the athletes and control the volunteer. The court noted there was a genuine issue as to whether SOF had those duties prior to the scheduled events, but refused to affirm the verdict because the court incorrectly instructed the jury on the law.

*Spence v. United States*<sup>182</sup>

The federal government moved for summary judgment on negligence claims brought against it by cyclist Jeanine Spence after she suffered injuries during an event when she was thrown off her bicycle after striking a gap in the pavement at a military training facility. The race organizers obtained permission from the government to have the event pass through the facility,

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182. 629 F. Supp. 2d 1068 (E.D. Cal. 2009).

but did not pay a fee because it was open to the public. The asphalt leading to gaps on a bridge was marked with bright paint, a typical method employed by cycling event organizers to warn of potential hazards. No participant had ever been injured as a result of those gaps and Spence had cycled the same route past them during the previous year's event. She was drafting behind a fellow cyclist at the time of the incident. Prior to the race, she completed a registration form that included a release purporting to shield the government from liability for injuries that she might suffer during the race.

The court granted the motion, holding that the registration release, the California recreational immunity statute, and Spence's assumption of the inherent risks of cycling barred Spence's claims. In assessing the purported release, the court emphasized the release language was not buried or hidden within the registration form and found it was broad enough to contemplate all acts of negligence. The court also determined the release did not have to include language giving Spence knowledge of all road hazards that she could encounter during the event, because some of those hazards were improbable and others were inherent risks of the sport. In assessing the impact of the recreational immunity statute, the court held the government did not act in a manner that would give rise to liability under any of the law's exceptions. It noted the government (1) did not have actual or constructive knowledge that the gaps posed a risk; (2) did not request any consideration in exchange for permission to allow the event; and (3) did not expressly invite any cyclist onto the property. The court also found the government did not have a duty to protect Spence from the risk injury caused by striking a gap because road hazards are risks inherent in the sport and the participants assumed all inherent risks.

*Sweeney v. City of Bettendorf*<sup>183</sup>

Tara Sweeney appealed a trial court's decision to grant summary judgment to the City of Bettendorf and its department of parks and recreation (DPR) on a negligent supervision claim she brought against them after she suffered injuries when a flying bat struck her while attending a minor league baseball game on a field trip sponsored by the DPR. Sweeney was sitting a few rows up from the field, in an unscreened portion of the stands, when a batter lost control of his bat on a swing. It was in the air for two-to-three seconds before hitting Sweeney, who was not paying attention to the game at the time. Before the trip, Sweeney's mother had signed a permission slip that purported to release the defendants from liability for any injuries caused by their negligent

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183. 762 N.W.2d 873 (Iowa 2009).

conduct at the game. The trial court held the slip constituted an enforceable exculpatory agreement and barred Sweeney's claim. In the alternative, it found that the city did not breach any duty that it owed to Sweeney because the risk of being hit by a flying bat in an unscreened portion of the stands is a risk inherent in attending games, and spectators generally assume inherent risks.

The Iowa Supreme Court affirmed in part and reversed in part. It held the permission slip was not an enforceable exculpatory agreement and that Sweeney had provided sufficient evidence to support her claim for negligent supervision because she was seated in a hazardous location. However, the court also concluded the defendants did not breach their duty to provide direct supervision because the incident took place so quickly they could not have stopped the bat from hitting Sweeney. In assessing the legal force of the permission slip, the Court found a lack of clear and unequivocal language that would notify parents that they were waiving all claims related to future acts of negligence by the defendants. In assessing whether the defendants engaged in negligent supervision, the court found Sweeney did not assume the risk of a bat striking her because she did not get to choose where to sit, and neither she nor her parents were warned of the danger of flying bats.

*Villegas v. Feder*<sup>184</sup>

Ithaca College and a physician with a fellowship in sports medicine at the school moved for summary judgment on negligence claims brought against them by one of the school's football players after the physician cleared him to play prior to his freshman year and allowed him to continue competing that fall despite his complaints about ankle problems stemming from a wrestling injury he suffered in high school. Prior to enrolling at the school, the player had undergone several months of physical therapy to rehab the ankle. However, in filling out the player's medical records, his personal doctor stated that he had no injuries that would inhibit his ability to participate in sports. The doctor who operated on him following the injury also did not caution him against playing. Upon arriving at the school, the player underwent an additional series of medical evaluations, including one performed by the defendant physician. The physician was aware that the player had suffered an ankle injury, but did not have his medical records. Nevertheless, he cleared the player because his personal doctor had already evaluated him and a significant amount of time had passed since the injury. During his first few weeks of practice, the player suffered two minor injuries to the ankle. He did

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184. No. 022381/07, 2009 N.Y. Misc. LEXIS 2926 (Sup. Ct. Oct. 14, 2009).



not miss any time, but went to see the physician again a month and a half later because the ankle was still bothering him. The physician still did not have the player's medical records, so he had to rely on the player's description of his prior injury to make a diagnosis. Ultimately, he recommended more physical therapy, but asked the player to return with his medical records. A few weeks later, he re-evaluated the player with the help of the records, and determined the ankle was improving. He advised the player to continue his exercises and told him it could take up to a year before the ankle fully healed. The player was able to finish the season, practice in the spring, work as a custodian in the summer, and then compete without complaint during his sophomore year. However, following that season, he complained that he had a limited range of motion and tenderness in the ankle, and went back to the doctor who had operated on him in high school. The doctor diagnosed him with an injury requiring another surgery.

The court granted the motion, adopting the defendants' expert's opinion that the physician's treatment conformed to notions of the accepted standard of care, and that it was highly unlikely that any of his acts were the proximate cause of the player's subsequent ankle injury. After assessing the physician's decision to originally clear the player, the court determined he was entitled to rely on the player's representations alone, based on the surrounding facts and circumstances. It noted the physical limitations the player was experiencing were not evidence of an underlying condition given the surgery and the short amount of time that had passed since the injury occurred. After assessing the physician's later treatment, the court found his evaluation and advice to seek more physical therapy was appropriate. It noted that nothing in the physical exam or the player's medical records indicated a need for x-rays or a referral to a specialist. Most importantly, the court concluded that the player's intervening acts between the last time he saw the physician and his later diagnosis negated the possibility that the injury existed earlier. It emphasized that he would not have been able to participate in athletic activities through his sophomore season if the injury had been there when the physician re-evaluated his medical fitness as a freshman.

*Vivyan v. Ilion Cent. Sch. Dist.*<sup>185</sup>

A spectator at an American Legion baseball game appealed a trial court's decision to grant summary judgment to the local American Legion Post and the owners and operators of the field where the game was played on negligence claims that he brought against them after he suffered injuries when

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185. 886 N.Y.S.2d 268 (App. Div. 2009).

he was hit in the head by a foul ball while seated in an unscreened area of the stands down the first-base line. The defendants had placed a screen on the backstop behind home plate, where the danger of a ball striking a spectator was the greatest; however, there were no bleachers or other seats located in that area. The appellate court reversed, holding the “limited duty” baseball rule did not bar the spectator’s claim because the defendants could not show that their screened seating was sufficient to provide protection for spectators that may reasonably be expected to desire it in the course of an ordinary game. In fact, no screened “seating” existed at all. The court emphasized that the availability of space behind the backstop did not automatically establish that the defendants satisfied their duty of reasonable care, and that whether the spectator assumed the risk of injury would have to be determined at trial.

*Ward v. Mich. State Univ.*<sup>186</sup>

Michigan State University (MSU) appealed a trial court’s decision to deny its motion for summary judgment on a negligence claim brought against it by a minor spectator at one of MSU’s hockey games and her parents under Michigan’s public building exception to governmental immunity. The spectator and her parents also appealed the court’s decision to grant the school’s motion for summary judgment on their negligence claim under Michigan’s proprietary function exception to governmental immunity. The claims arose out of injuries that the spectator suffered when a hockey puck that flew into the stands during the game struck her in the head. The appellate court reversed the decision to deny summary judgment on the claim brought under the public building exception and affirmed the decision to grant summary judgment on the claim brought under the proprietary function exception. In barring the use of the public building exception, the court held it could not assess liability for MSU’s failure to install Plexiglas to protect the section of the stands where the minor was sitting because the plaintiffs did not serve the school requisite notice of the occurrence of the incident, which was a precondition to bringing the claim under Michigan law. In barring the use of the proprietary function exception, the court noted the operation of an intercollegiate athletics program fits in the broad definition of a governmental function immune from liability and held the plaintiffs failed to show that the school’s primary purpose in operating that program was to generate a profit. Nine months later, the Michigan Supreme Court vacated the decision of the appellate court and remanded to the case to reconsider the university’s appeal

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186. No. 281087, 2009 Mich. App. LEXIS 169 (Jan. 27, 2009), *vacated by* 773 N.W.2d 666 (Mich. 2009).

in light of the court's order on reconsideration in *Chambers v. Wayne County Airport Authority*.

*Welch v. Sudbury Youth Soccer Ass'n*<sup>187</sup>

Youth soccer player Dustin Welch appealed a trial court's decision to dismiss the negligence claim he brought against a youth soccer association and its parent association after he suffered injuries when a goal post fell on him during a game. The Massachusetts Supreme Court affirmed, holding that the nonprofit associations were immune from liability for negligence in conducting a sports program under Massachusetts law. The Court noted that those associations were not immune for their acts relating to the care and maintenance of real estate that they controlled and used in connection with a sports program. However, it determined that the goal posts were not real estate under state law, and that the associations were acting in furtherance of the program when setting them up.

*Williams v. Middletown Bd. of Educ.*<sup>188</sup>

A school system's board of education, the board's members, the Amateur Athletic Union (AAU), and the AAU president moved for summary judgment on negligence claims brought against them by the parent of an AAU basketball player after the player suffered injuries when he slipped on a high school gym floor covered with dust during his team's practice. The player's team paid the board just over \$100 to use the gym approximately two weeks before the injury occurred. The school system's policies allowed it to rent the gym, but still made school personnel responsible for eliminating any known hazard that could jeopardize the safety of the public. The policies also emphasized that renters could not waive custodial fees, which were set at thirty-five dollars per hour and accrued a minimum of one-half hour prior to functions until a minimum of one hour after functions.

The trial court denied the motion, holding that the parent's allegations were sufficient to support a finding that the AAU and its president had possession and control of the gym at the time that the player was injured, and that the board and its members were not entitled to municipal immunity. In rejecting the immunity defense, the court emphasized that the board and its members could be held liable if they were acting in a proprietary capacity in leasing the gym or violating a mandatory public duty by failing to ensure a custodian attended the practice. The court also noted that a jury could infer

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187. 901 N.E.2d 1222 (Mass. 2009).

188. No. CV075002093, 2009 Conn. Super. LEXIS 435 (Conn. Super. Feb. 20, 2009).

that school system designed its policy of charging custodial fees prior to the beginning of a function to give it the opportunity to eliminate any hazard that might be in place.

*Zeidman v. Fisher*<sup>189</sup>

A recreational golfer appealed a trial court's decision to grant summary judgment to one of his playing partners on a negligence claim brought by the golfer after he suffered injuries when he was struck by a ball hit by the partner during a charity outing. Prior to the errant shot, the golfer drove over the crest of a hill that blocked the view of the green in order to ensure the group ahead of them was out of harm's way. Subsequently, he began following the cart path back to the tee box, which ran alongside the fairway, to inform his partners that the green was clear. The golfer was not watching the tee box at this time; thus, he never saw the defendant prepare to swing. However, he was less than 100 yards from the box, in full view of the partners, when the defendant took the shot.

The appellate court reversed, holding that there was a genuine issue of material fact as to whether the "assumption of the risk" doctrine or the "no duty" rule barred the golfer's negligence claim. In assessing the assumption of risk defense, the court determined that the golfer may not have consciously assumed the chance of being struck by a ball while he was driving back to the tee box because he did not anticipate that his playing partners would take a shot until they were assured the green was clear. In assessing the "no duty" defense, the court emphasized that the defense shields participants only from liability for injuries caused by risks inherent in the sport, and that they still have a duty to avoid exposing their co-participants to other foreseeable risks of harm.

CONCLUSION

Throughout 2009, both courts and arbitral bodies made a number of decisions that are sure to have an indelible impact on the field of sports law. The cases presented in the survey offer a glimpse at how the law continues to evolve, especially with respect to the bankruptcy, labor, and intellectual property issues that stole the headlines and captivated legal analysts throughout the year. But 2010 promises to be even better, as the United States Supreme Court prepares to rule on *American Needle v. National Football League*,<sup>190</sup> a case that could redefine how antitrust laws apply to professional

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189. 980 A.2d 637 (Pa. Super. Ct. 2009).

190. 538 F.3d 736 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2859 (2009).

sports leagues. The growth of sports on an international scale also promises to expand the influence of the Court of Arbitration for Sport, which just celebrated its twenty-fifth anniversary. Clearly, the world of sports will continue to be an exciting lens through which to view the convergence of many areas of the law, regardless of the interests at stake.